

| | |
|---|-----------|
| I. PROCEDURAL HISTORY | 1 |
| II. DESCRIPTION OF THE PROPOSED TRANSACTION | 3 |
| A. OVERALL STRUCTURE OF THE TRANSACTION | 3 |
| B. DESCRIPTION OF THE AGREEMENTS | 4 |
| C. DESCRIPTION OF MISSION | 6 |
| III. SECTION 16-111(G) | 7 |
| IV. THE COMPANY'S COMPLIANCE WITH THE NOTICE REQUIREMENTS. | 8 |
| A. COMPLIANCE WITH SUBSECTION (I)..... | 8 |
| B. COMPLIANCE WITH SUBSECTION (II). | 8 |
| C. COMPLIANCE WITH SUBSECTION (III). | 9 |
| D. COMPLIANCE WITH SUBSECTION (IV). | 10 |
| E. COMPLIANCE WITH SUBSECTION (V). | 10 |
| F. COMPLIANCE WITH SUBSECTION (VI)..... | 11 |
| V. COMPLIANCE WITH SECTION 16-128(C)..... | 11 |
| VI. DISPUTED ISSUES..... | 12 |
| A. ABILITY TO PROVIDE TARIFFED SERVICES IN A SAFE AND RELIABLE MANNER. | 13 |
| B. STRONG LIKELIHOOD OF INCREASE IN BASE RATES | 23 |
| C. ACCOUNTING REQUIREMENTS | 24 |
| VII. COMMISSION ANALYSIS AND CONCLUSIONS | 25 |
| A. THRESHOLD ISSUES | 25 |
| B. SAFETY AND RELIABILITY | 33 |
| C. LIKELIHOOD OF ELIGIBILITY FOR A BASE RATE INCREASE..... | 40 |
| D. STAFF'S ACCOUNTING ISSUE..... | 41 |
| VIII. COMMISSION FINDINGS AND ORDERING PARAGRAPHS | 41 |

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

| | | |
|---|---|-----------------------|
| Commonwealth Edison Company | : | 99-0273 |
| | : | |
| Petition to protect confidential and | : | |
| proprietary information from public | : | |
| disclosure submitted pursuant to Section | : | |
| 16-111(g) of the Public Utilities Act as part | : | |
| of a Notice of Property Sale. | : | |
| and | : | |
| Illinois Commerce Commission | : | 99-0282 |
| On Its Own Motion | : | |
| vs. | : | |
| Commonwealth Edison Company | : | |
| | : | |
| Proceeding pursuant to Section 16-111(g) | : | (Consolidated) |
| of the Public Utilities Act concerning | : | |
| proposed sale of fossil fuel fired generating: | : | |
| plants. | : | |

HEARING EXAMINERS' PROPOSED ORDER

By the Commission:

I. Procedural History

On May 13, 1999, Commonwealth Edison Company ("ComEd") filed a Notice of Property Sale ("Notice") with the Illinois Commerce Commission ("Commission") stating its intention to sell its fossil-fuel generating plants to Edison Mission Energy ("Mission") pursuant to Section 16-111(g) (220 ILCS 5/16-111(g)) of the Public Utilities Act ("Act"). The plants included in the proposed sale are coal-fueled units (Crawford, Fisk, Waukegan, Will County, Joliet and Powerton), dual-fueled (gas and oil) units (Collins) and gas-fueled and oil-fueled peaking units (Crawford, Fisk, Waukegan, Calumet, Joliet, Bloom, Electric Junction, Sabrooke and Lombard) (collectively, the "Stations"). To accomplish the sale of the Stations, ComEd proposes to first convey them to Unicom Investments, Inc. ("UII"), a subsidiary of ComEd's parent corporation, Unicom. UII would then transfer the Stations to Mission.

On May 13, 1999, ComEd also filed a Petition to Protect Confidential and Proprietary Information from Public Disclosure ("Confidentiality Petition"), in which ComEd sought a protective order pursuant to 83 Ill. Adm. Code 200.430 to prevent public disclosure of certain information contained in and associated with the Notice. The Confidentiality Petition was assigned Docket Number 99-0273.

On May 18, 1999, the Staff of the Commission ("Staff") issued a report concerning ComEd's proposed sale, which was made part of the record in this case. Staff's report found, among other things, that the Stations comprise approximately 41% of ComEd's net dependable generating capacity as of December 16, 1997, the effective date of P.A. 90-561, which added Article XVI to the Act. Under section 16-111(g)(vi) of the Act, if a utility proposes to sell generating capacity in "an amount equal to or greater than 15% of its net dependable capacity on the effective date of this Amendatory Act of 1997," the utility is required to provide a notice with certain information. If, within 30 days after the filing of the notice, the Commission has not issued an order initiating a hearing on the proposed transaction, the transaction described in the notice is deemed approved.

On May 18, 1999, the Commission issued an order initiating a proceeding pursuant to Section 16-111(g)(vi) of the Act, requiring ComEd to "show cause and present evidence why the proposed sale of the Stations should not be prohibited." The show cause proceeding was assigned Docket Number 99-0282.

Petitions to intervene were filed in Docket 99-0282 by the Citizens Utility Board ("CUB"), the Attorney General of the State of Illinois ("State"), the International Brotherhood of Electrical Workers ("IBEW") Local 15, the State's Attorney of Cook County ("County"), the Illinois and Midland Railroad ("Railroad"), the Illinois Industrial Energy Consumers ("IIEC"), and Gordon L. Goodman, an individual. ComEd objected to intervention by the County, the Railroad, the IIEC and Mr. Goodman, and requested modifications to the intervention petitions of the other prospective parties. After briefs were submitted concerning ComEd's objections, the Hearing Examiners granted the petitions of CUB, the AG, the County and IBEW. All other petitions to intervene were denied. Pursuant to interlocutory review of the Hearing Examiners' ruling denying IIEC's petition to intervene, the Commission granted its petition.

Pursuant to notice duly given in accordance with the provisions of the Act, a prehearing conference was held on May 28, 1999, before two duly authorized Hearing Examiners at the Commission's offices in Chicago. At that time, Dockets 99-0273 and 99-0282 were consolidated by the Hearing Examiners without objections from the parties.

On June 25 and June 28, 1999, evidentiary hearings were conducted. Appearances were entered on behalf of ComEd, Staff, the State, the County and IBEW. ComEd presented the testimony of Robert J. Manning, Executive Vice President and President-Competitive Operations for ComEd; Robert E. Berdelle, Vice President and

Comptroller of ComEd; Daniel E. Thone, Assistant Treasurer of ComEd; William J. Baumol, Professor of Economics and Director of the C.V. Starr Center for Applied Economics at New York University; and Calvin Manshio, Partner, Manshio and Wallace. Staff presented the testimony of Karen A. Goldberger, Senior Accountant in the Financial Analysis Division of the Accounting Department; Joy Nicdao-Cuyugan, Director of the Finance Department of the Financial Analysis Division; and Bruce A. Larson, Senior Analyst in the Engineering Department of the Energy Division. IBEW presented the testimony of William H. Starr, President and Business Manager of IBEW Local 15. At the conclusion of the hearing on June 28, 1999, the record was marked "Heard and Taken".

ComEd, Staff, the State, the County, and IBEW filed simultaneous initial briefs and reply briefs. A Hearing Examiner's Proposed Order was served on all of the parties on July ____, 1999. Exception and replies to exceptions were filed by _____

II. DESCRIPTION OF THE PROPOSED TRANSACTION

A. Overall Structure of the Transaction

The Stations are all of ComEd's fossil-fueled generating stations and peaking units. The Stations' net dependable generating capacity is greater than 15 percent of ComEd's net dependable capacity as of the effective date of the 1997 amendments to the Act. ComEd Ex. 9, p. 7.

On March 22, 1999, ComEd and Mission entered into an Asset Sale Agreement (the "Mission Agreement") under which Mission agreed to purchase, directly or through one or more wholly-owned subsidiaries (collectively "Mission"), the Stations, including certain parcels of real property on which each Station is situated and certain improvements, buildings, structures, and fixtures thereon, and related personal property, including related inventories of fuel and other materials, and the assignment and assumption of certain coal supply and transportation rights and obligations with respect to those Stations (collectively the "Assets"). A copy of the Mission Agreement, which includes the complete terms and conditions of the transaction and a description of the Assets, was attached as Exhibit A to ComEd's Notice and is part of the record in this proceeding. ComEd Ex. 9.

On May 11, 1999, ComEd and Unicom Investment Inc. ("UII"), a wholly owned subsidiary of Unicom Corporation (ComEd's parent company) ("Unicom"), entered into an Asset Sale Agreement (the "UII Agreement") to transfer the Assets (including the Stations) (the "Subject Assets") to UII immediately prior to the time that the Subject Assets would otherwise be transferred to Mission pursuant to the Mission Agreement. UII will then immediately transfer the Subject Assets to Mission. A copy of the UII

Agreement, which includes the complete terms and conditions of the transaction, was attached to ComEd's Notice as Exhibit B and is part of the record in this proceeding. ComEd Ex. 9.

B. Description of the Agreements

1. The Mission Agreement

The Mission Agreement consists of various agreements, including an Asset Sale Agreement ("ASA"), Power Purchase Agreements ("PPAs"), and Facilities, Interconnection and Easement Agreements (the "Facilities Agreements"). The cash consideration that Mission will pay at the closing is \$4.813 billion, which amount is subject to adjustment as set forth in the Mission Agreement and as may be agreed to by ComEd and Mission to provide ComEd with reimbursement of funds expended on approved capital projects that are undertaken prior to the closing (collectively the "Price Adjustments"). ComEd Ex. 9, pp. 8-9.

An integral part of the Mission Agreement are the PPAs, pursuant to which ComEd will have the right to acquire all of the capacity and energy from the Stations through the summer of 2004. There are three PPAs, one for the coal-fueled generating units (located at Crawford, Fisk, Waukegan, Will County, Joliet and Powerton) (the "Coal PPA"), one for the dual (gas and oil)-fueled Collins Station (the "Collins PPA") and one for the gas- and oil-fueled peaking units (located at Crawford, Fisk, Waukegan, Calumet, Joliet, Bloom, Electric Junction, Sabrooke and Lombard) (the "Peaker PPA"). Each of the PPAs grants ComEd the right to dispatch and receive electric energy from specified generating units. In exchange for these rights, ComEd will pay Mission a capacity charge and make certain other payments -- including a charge for each megawatthour of energy taken under the PPAs -- and will purchase a guaranteed minimum amount of energy each year from Collins and certain of the Peakers. As discussed further below, the PPAs include a blend of committed capacity and options that ComEd asserts will allow it to structure its generation portfolio to best meet its needs and its customers' requirements. ComEd Ex. 9, p. 9.

The Mission Agreement also requires Mission to hire a "sufficient number" of ComEd's non-supervisory employees to operate and maintain the Assets. (ComEd Ex. 9, Ex. A, pp. 38-39). With respect to the offers of employment Mission chooses to make to ComEd's non-supervisory workforce in the fossil division, the offers must be at no less than the wage rates, and on terms and conditions of employment (including fringe benefits) that are substantially equivalent to those provided by ComEd on the date the Assets are transferred to Mission. Mission must use commercially reasonable efforts to make such offers not less than sixty days prior to the date on which the Assets will be transferred. ComEd Ex. 9, pp. 9-10.

The Mission Agreement requires Mission to complete installation of 500 megawatts of gas-fired capacity within the City of Chicago no later than the fourth

anniversary of the closing date (which is expected to be in September 1999). ComEd will have a right of first offer on firm, committed capacity from the new unit(s). Under this right, Mission must offer firm, committed capacity to ComEd before it can offer such capacity to any other potential purchaser and, if ComEd declines the offer, Mission may not offer it to any other entity on terms more favorable than the terms offered to ComEd. Prior to the time that the capacity must be installed, Mission must, upon ComEd's request, demonstrate that it is taking reasonable steps to have the capacity installed no later than four years after closing. If Mission fails to provide such reasonable assurances or fails to install the capacity, ComEd may seek an appropriate remedy, including specific performance. ComEd Ex. 9, p. 10.

The Mission Agreement allows ComEd to sell or assign the Assets together with related rights under the Mission Agreement to a subsidiary of Unicom. Pursuant to this right, ComEd has entered into the Ull Agreement, under which ComEd intends to transfer its right, title and interest in and to the Subject Assets to Ull subject to the terms and conditions of the Ull Agreement. ComEd Ex. 9, p. 11.

The Subject Assets will remain subject to the Mission Agreement, e.g., Ull will be required to transfer the Subject Assets to Mission just as ComEd would be required to do if it continued to own the Subject Assets. Both Mission and ComEd will continue to be bound by the Mission Agreement. Thus, for example, Mission will remain liable to ComEd for its commitment to install 500 megawatts of gas-fired capacity and Mission and ComEd must enter into the PPAs, the Facilities Agreements and other agreements that are part of the Mission Agreement. ComEd Ex. 9, p. 11.

The Facilities Agreements and certain other easement agreements govern the future relationship between ComEd and Mission that will arise because (1) ComEd will continue to own the transmission and distribution equipment on the property being sold to Mission, and (2) Mission will own facilities which are interconnected with ComEd's transmission and distribution system. The Facilities Agreements address a wide range of issues including, for example, access to equipment and facilities, interconnection of the generating units with the transmission system, generator synchronization, communications, transmission system emergencies and black start plans. The easement agreements address access for specific purposes or to specific equipment or facilities. ComEd Ex. 9, pp. 10-11.

2. The Ull Agreement

The transfer of the Subject Assets from ComEd to Ull will take place just prior to consummation of the sale provided for in the Mission Agreement. In consideration for the transfer of the Subject Assets, Ull will pay ComEd consideration totaling \$4.813 billion, subject to price adjustments. The consideration will be in the form of a demand note (the "Demand Note") in the amount of \$2.35 billion and interest-bearing term notes having the terms described in the following paragraph. Ull will not operate any of the Subject Assets. Instead, Ull will immediately transfer the Subject Assets to Mission, in

consideration of which UII will receive \$4.813 billion in cash from Mission, subject to price adjustments. Contemporaneously therewith, ComEd and Mission will execute the PPAs, the Facilities Agreements and other required agreements. In short, ComEd will receive consideration equal to the consideration set forth in the Mission Agreement. ComEd Ex. 9, p. 12.

Immediately after its receipt of the cash payment from Mission, UII will pay the \$2.35 billion aggregate principal due to ComEd under the Demand Note. This cash payment to ComEd will be used in part to pay all of the costs and taxes associated with the transaction. The remainder of such payment will be available to fund transmission and distribution projects, nuclear generating station projects, environmental initiatives and other activities. The balance of the amount due to ComEd will be paid to ComEd through the issuance and delivery by UII of interest-bearing notes with terms ranging up to 12 years (the "UII Notes"). The UII Notes will be guaranteed by Unicom. During the term of the UII Notes, ComEd will receive interest payments from UII. Upon maturity of the UII Notes, ComEd will receive the principal amount of such notes. ComEd Ex. 9, pp. 12-13.

During the term of the UII Notes, UII is expected to use the cash received from Mission which exceeds the \$2.35 billion it will immediately pay to ComEd to invest in business opportunities. ComEd claims that structuring the transaction to include the UII Agreement provides an opportunity for Unicom to diversify and strengthen its financial position while correspondingly assuring for ComEd a guaranteed flow of interest income throughout the term of the UII Notes and ultimate receipt of the principal amount of those Notes. ComEd Ex. 9, p. 13.

The Mission Agreement, including the PPAs, the Facilities Agreements and the other terms and conditions of that agreement, and the UII Agreement, including the UII Notes, (collectively, the "Agreements") together form a single, integrated transaction. ComEd Ex. 9, p. 13.

C. Description of Mission

Mission is an indirect, wholly-owned subsidiary of Edison International ("EIX"). EIX is also the parent company of Southern California Edison ("SCE"), a large electric utility, and several other companies, including Edison Capital, a provider of infrastructure project financing. Prior to divestiture of most of its fossil-generating units pursuant to the California deregulation plan, SCE owned and operated 14,544 megawatts of capacity. ComEd Ex. 9, p. 13.

Mission has fossil-fueled power plants operational and construction experience and expertise. It currently operates 36 generating plants with aggregate capacity of 7,040 megawatts in Australia, Spain, the United Kingdom and the United States. Approximately 5,000 megawatts of this capacity are fossil-fueled generation. Mission

also currently has additional generating units with capacity of more than 3,000 megawatts under construction or pending closing in Indonesia, Italy, Thailand, Turkey, New Zealand and Puerto Rico. ComEd Ex. 9, p. 14.

In 1997 and 1998, plants operated by Mission had an average availability factor close to 100 percent. (*Id.*; Manning, Tr. 260). ComEd asserts that Mission's 1998 worldwide weighted average forced outage factor and accident rate were very low. (ComEd Ex. 9.0 at 22; Manning, Tr. 185-86). ComEd provided testimony showing that, in 1995, an international benchmarking study selected the five best-performing plants in maintenance and the four top-performing plants in operation. (Manning, ComEd Ex. 1.0 at 7). Mission operated four of the top five plants that were recognized for superior maintenance, and all four plants that were recognized for operations. (*Id.*). According to ComEd, Mission and the individuals who make-up its management team are well-respected industry experts with a long track record of successfully operating generating stations built by others. Manning, ComEd Ex. 1.0 at 6-7; Manning, Tr. 260.

It is ComEd's understanding that Mission plans to invest more than \$200 million in environmental enhancements. ComEd believes that a primary goal of these upgrades is to reduce nitrogen oxides emissions by more than fifty percent within three years of the date Mission assumes control of the Stations. ComEd Ex. 9, p. 14.

III. SECTION 16-111(g)

ComEd's Notice was filed pursuant to Section 16-111(g) of the Act. Section 16-111(g)(4) provides that, no less than 30 days prior to the proposed transaction, a utility must provide a notice of the proposed transaction which provides detailed information concerning the transaction. The "details" required to be contained in the notice are spelled out in section 16-111(g)(4)(i)-(vi).

Section 16-111(g) also requires that the utility "comply with subsections (c) and (d) of Section 16-128, if applicable." 220 ILCS 5/16-111(g)(4). Subsection (c) applies to all asset sales; subsection (d) only applies to sales to "a majority-owned subsidiary" of the electric utility. Because ComEd's proposed sale is not to a majority-owned subsidiary of ComEd, subsection (d) does not apply in this case; only subsection (c) applies. Staff witness Goldberger agreed that only subsection (c) applies to this proceeding. Staff Ex. 1.0, p. 7.

Section 16-111(g) provides that there are two grounds on which the Commission can prohibit the proposed sale:

The Commission may, after notice and hearing, prohibit the proposed transaction if it makes either or both of the following findings: (1) that the proposed transaction will render the electric utility unable to provide its tariffed services in a safe and reliable manner, or (2) that there is a

strong likelihood that consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection (d) of this Section.

IV. THE COMPANY'S COMPLIANCE WITH THE NOTICE REQUIREMENTS.

ComEd must fully comply with each of the requirements of Section 16-111(g). We address each of these criteria in the order they are listed in the statute.

A. Compliance with subsection (i).

Subsection (i) requires that ComEd provide:

(i) a complete statement of the entries that the electric utility will make on its books and records of account to implement the proposed reorganization or transaction together with a certification from an independent certified public accountant that such entries are in accord with generally accepted accounting principles and, if the Commission has previously approved guidelines for cost allocations between the utility and its affiliates, a certification from the chief accounting officer of the utility that such entries are in accord with those cost allocation guidelines.

220 ILCS 5/16-111(g)(4)(i).

ComEd states that the Notice provides each of the required items. Attached as Exhibit E to the Notice is a complete statement of entries that ComEd will make on its books and records to reflect the proposed transaction. Attached as Exhibit F to the Notice is a statement from Arthur Andersen LLP, independent certified public accountants, that the entries set forth in Exhibit E are in accordance with GAAP. As set forth in paragraph 49 of the Notice, the Commission has previously approved guidelines for cost allocations between ComEd and its affiliates. See Order, Ill. C.C. Dkt. 95-0615 (Mar. 12, 1997). Attached as Exhibit G to the Notice is a statement by Mr. Berdelle, the Company's chief accounting officer, certifying that the entries are in accordance with cost allocation guidelines. Staff witness Goldberger testified that ComEd complied with this subsection. Staff Ex. 1.0, pp. 4, 9.

B. Compliance with Subsection (ii).

Subsection (ii) requires that ComEd provide:

(ii) a description of how the electric utility will use proceeds of any sale, assignment, lease or transfer to retire debt or otherwise reduce or recover the costs of services provided by such electric utility.

220 ILCS 5/16-111(g)(4)(ii). ComEd intends to use the sale proceeds to amortize the regulatory asset that was created as part of a generating plant investment impairment analysis following passage of the 1997 amendments to the Act. ComEd expects to use the cash that it receives as a result of the transaction to pay taxes and expenses associated with the transaction, fund projects intended to enhance ComEd's transmission and distribution system, enhance ComEd's nuclear generating operations, fund environmental initiatives, and invest in economic development activities and similar projects. Among the projects that will be funded, according to ComEd, are transmission and distribution projects that constitute part of ComEd's purported 30 percent increase in transmission and distribution expenditures and new projects at various nuclear stations. (See Notice at ¶¶ 50-52). Staff witness Goldberger agreed that ComEd has complied with this subsection. Staff Exh. 1.0, pp. 4, 9.

C. Compliance with Subsection (iii).

Subsection (iii) requires that ComEd provide:

(iii) a list of all federal approvals or approvals required from departments and agencies of this State, other than the Commission, that the electric utility has or will obtain before implementing the reorganization or transaction.

220 ILCS 5/16-111(g)(4)(iii). All of the requisite federal and state approvals that are required are catalogued in paragraph 53 of the Notice and in Exhibit J to the Notice. Staff witness Goldberger agreed that ComEd complied with this subsection. Staff Ex. 1.0, pp. 4, 9.

D. Compliance with Subsection (iv).

Subsection (iv) requires that ComEd provide:

(iv) an irrevocable commitment by the electric utility that it will not, as a result of the transaction, impose any stranded cost charges that it might otherwise be allowed to charge retail customers under federal law or increase the transition charges that it is otherwise entitled to collect under this Article XVI.

220 ILCS 5/16-111(g)(4)(iv). ComEd has made such a commitment in paragraph 54 of its Notice. Staff witness Goldberger agreed that ComEd complied with this subsection. Staff Ex. 1.0, pp. 4, 9.

E. Compliance with Subsection (v).

Subsection (v) requires that ComEd provide:

(v) if the electric utility proposes to sell, assign, lease or otherwise transfer a generating plant that brings the amount of net dependable generating capacity transferred pursuant to this subsection to an amount greater than 15% of the electric utility's net dependable capacity as of the effective date of this amendatory Act of 1997, and enters into a power purchase agreement with the entity to which such generating plant is sold, assigned, leased, or otherwise transferred, the electric utility also agrees, if its fuel adjustment clause has not already been eliminated, to eliminate its fuel adjustment clause in accordance with subsection (b) of Section 9-220 for a period of time equal to the length of any such power purchase agreement or successor agreement, or until January 1, 2005, whichever is longer . . .

220 ILCS 5/16-111(g)(4)(v). ComEd explains in paragraph 55 of its Notice, that it has previously terminated its fuel adjustment clause.

F. Compliance with Subsection (vi).

Subsection (vi) requires that ComEd provide:

(vi) In addition, if the electric utility proposes to sell, assign, or lease . . . an amount of generating plant that brings the amount of net dependable generating capacity transferred pursuant to this subsection to an amount equal to or greater than 15% of its net dependable capacity on the effective date of this amendatory Act of 1997 . . . the electric utility shall provide, in addition to the information listed in subparagraphs (i) through (v), the following information: (A) a description of how the electric utility will meet its service obligations under this Act in a safe and reliable manner and (B) the electric utility's projected earned rate of return on common equity, calculated in accordance with subsection (d) of this Section, for each year from the date of the notice through December 31, 2004 both with and without the proposed transaction.

220 ILCS 5/16-111(g)(4)(vi). On pages 15 through 31 of its Notice, ComEd detailed how it intends to meet its service obligations in a safe and reliable manner. ComEd also provided its projected earned rates of return through 2004, both with and without the proposed transaction. The information provided in the Notice is sufficient to meet the formal requirements of this subsection.

V. COMPLIANCE WITH SECTION 16-128(c)

In addition to the information that must be submitted in the Notice, section 16-111(g)(4) requires that ComEd comply with section 16-128(c) of the Act. Section 16-128(c) provides that:

(c) In the event of a sale, purchase, or any other transfer of ownership during the mandatory transition period of one or more Illinois divisions or business units, and/or generating stations or generating units, of an electric utility, the electric utility's contract and/or agreements with the acquiring entity or persons shall require that the entity or persons hire a sufficient number of non-supervisory employees to operate and maintain the station, division or unit by initially making offers of employment to the non-supervisory workforce of the electric utility's division, business unit, generating station and/or generating unit at no less than the wage rates, and

substantially equivalent fringe benefits and terms and conditions of employment that are in effect at the time of transfer of ownership of said division, business unit, generating station, and/or generating units; and said wage rates and substantially equivalent fringe benefits and terms and conditions of employment shall continue for at least 30 months from the time of said transfer of ownership unless the parties mutually agree to different terms and conditions of employment within that 30-month period. The utility shall offer a transition plan to those employees who are not offered jobs by the acquiring entity because that entity has a need for fewer workers. If there is litigation concerning the sale, or other transfer of ownership of the electric utility's divisions, business units, generating station, or generating units, the 30-month period will begin on the date the acquiring entity or persons take control or management of the divisions, business units, generating station or generating units of the electric utility.

220 ILCS 5/16-128(c).

ComEd states that the Mission Agreement requires Mission to hire a sufficient number of non-supervisory employees to operate and maintain the Stations and to comply with the other requirements of section 16-128(c). The Mission Agreement also requires Mission to: (a) credit those non-supervisory employees for prior service with ComEd for eligibility and vesting purposes and waiver of waiting periods and restrictions regarding pre-existing conditions for health plans; (b) recognize Local 15 as the exclusive bargaining agent for those employees who accept Mission's offer of employment and who are represented by the Union; and (c) assume the collective bargaining agreement in effect at closing. The Notice also describes the transition plan that will be available to employees who do not accept employment with Mission. ComEd Exh. 9, ¶¶ 42-46, Ex. A, pp. 38-39; see also ComEd Exh. 1.0, pp. 12-13; ComEd Exh. 10.

VI. DISPUTED ISSUES

As discussed above, the two grounds on which this Commission can prohibit the proposed transaction are: (1) that the proposed transaction will render the electric utility unable to provide its tariffed services in a safe and reliable manner; or (2) that there is a strong likelihood that consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection (d) of Section 16-111.

We initially observe that none of the intervening parties expressly oppose the sale to Mission, although the County proposes that the proposed transactions not be

approved until ComEd shows “that the sale of its fossil fuel plants will result in reliable and safe service.” County Initial Brief, at 6. The evidence and argument furnished by Staff and Intervenor generally relate to conditions those parties would attach to the proposed sale or to provisions that would be included in an approval Order.

A. Ability to Provide Tariffed Services in a Safe and Reliable Manner.

1.) ComEd's Presentation

ComEd emphasizes that open access will begin in Illinois on October 1, 1999. See, e.g., 220 ILCS 5/16-104(a). ComEd asserts that with the advent of competition, it must not only continue to predict how fast load will grow, but also predict how much existing and future load it will be called upon to serve. Accordingly, ComEd argues that, like all other Illinois electric utilities, it needs greater flexibility to meet its on-going service requirements reliably and cost-efficiently. ComEd Exh. 3.0 at 4-6. ComEd asserts that the proposed transactions are designed to meet this need in the ways described below.

a.) Reliability in the summer of 1999

First, ComEd avers that the sale of the Stations will not affect ComEd's provision of services during the Summer of 1999. ComEd Exh. 1.0 at 7. The Mission Agreement provides that, unless ComEd and Mission agree to an earlier date, the closing may not occur until September 30, 1999, or such later date on which all of the conditions to closing are satisfied. Id. ComEd emphasizes that this provision avoids a change of ownership and operational management during the potentially high-use peak summer period. Id.

b.) Reliability of transmission, distribution and delivery

ComEd points out that it is not selling any facilities by which it provides transmission, distribution, or delivery services to other customers. (Id. at 8). The only transmission-related facilities that will be sold are those which are commonly considered an integral part of generating stations, the most significant of which are the "step-up" transformers that are used to support generation by raising power to higher voltages. (Id.; ComEd Ex. 9.0 at 15). Similarly, the only distribution facilities which will be sold are those associated with the Stations, none of which is needed to provide service to other customers. Manning, ComEd Ex. 1.0 at 8; ComEd Ex. 9.0 at 15-16.

In addition, ComEd maintains that the Facilities Agreements and certain of the other easement agreements assure that it will have all necessary access to transmission and distribution facilities located on the property that will be sold. (Manning, ComEd Ex. 1.0 at 8). Further, ComEd contends that the Facilities Agreements, which include the same type of provisions that will be included in

interconnection agreements for all non-ComEd-owned generation, contain comprehensive requirements, procedures and policies which are designed to ensure that Mission's operation of the Stations will not adversely impact the ComEd system. (Id.). Finally, in ComEd's view, the Mission Agreement contains extensive operational standards and requirements which will ensure that the operation of the Stations will be consistent with maintaining the integrity and reliability of ComEd's system and the interconnected systems in the Mid-American Interconnected Network ("MAIN"). Id. at 15-16.

ComEd additionally avers that the sale of the Stations will enhance its provision of transmission, distribution, and delivery services by providing funds -- initially over \$300 million -- to finance planned transmission and distribution enhancement programs. (Berdelle, ComEd Ex. 2.0 at 3-6; ComEd Ex. 9.0 at Ex. I). In addition, ComEd notes that it will receive interest on the approximately \$2.45 billion of notes UII will pay ComEd for the remainder of the purchase price. (Berdelle, ComEd Ex. 2.0 at 4). ComEd expects its interest income to exceed \$100 million annually in the initial years before principal amortization. (Id.). Similarly, as the UII Notes mature, UII will remit the principal amount of each UII Note to ComEd. (Id.). ComEd stresses that the interest income and principal payments will be a regular source of cash for ComEd over the next twelve years and will be available for general corporate purposes, including funding additional projects that will maintain and enhance ComEd's transmission and distribution systems. Id. at 3-4; ComEd Ex. 9.0 at Ex. I, pp. 1-2.

ComEd described four specific projects related to its transmission and distribution system that ComEd expects to finance with cash resulting from the sale. (See Berdelle, ComEd Ex. 2.0 at 5; ComEd Ex. 9.0 at Ex. I). First, ComEd expects to spend approximately \$49 million on its infrastructure refurbishment and distribution cable program. (Berdelle, ComEd Ex. 2.0 at 5). The focus of this program is to replace and refurbish equipment and distribution cable, primarily related to substation facilities, before potential failure of that equipment. (Id.). Second, ComEd expects to spend approximately \$65 million on its distribution target programs, (Id.), which are intended to improve the portions of the distribution system used to serve customers who have more than the average amount of interruptions, including those served by feeders with reliability (as determined by interruption frequency) that is within the lowest one percentile. Id. at 5-6.

Third, ComEd expects to spend approximately \$84 million on its distribution system automation program. Id. at 6. This program includes the installation of sensing devices and automated switches on the distribution system. Id.. The sensing devices will allow distribution outage information to be automatically sent to the dispatcher so a crew can be sent to resolve problems sooner than would otherwise be the case. Id. The automated switches will allow certain service restoration work to be performed automatically. Id. Fourth, approximately \$110 million is expected to be spent on transmission network upgrades. Id. The specific upgrades will include (1) upgrades

necessary to support independent power producers; and (2) relocating, reconfiguring and upgrading metering and operational control facilities. Id.

c.) Reliability of tariffed services

ComEd alleges that the sale will enhance reliability of tariffed services in a number of ways. First, it will result in at least 500 megawatts of new capacity in the City of Chicago, which Mission will be required to build within four years of the closing date. (Id. at 10). Second, the transaction will foster competition and encourage others to build capacity and otherwise compete in the Illinois generation market. (Manning, ComEd Ex. 1.0 at 16-17; Baumol, ComEd Ex. 4.2 at 5-16; Thone, ComEd Ex. 3.0 at 12-14). Third, the cash that will result from the sale will allow ComEd to fund projects that will enhance its nuclear operations. (Berdelle, ComEd Ex. 2.0 at 3). Fourth, the cash that will result from the sale will allow ComEd to fund energy conservation and renewable energy projects. ComEd Ex. 9.0 at Ex. I, p. 3.

ComEd acknowledges that it presently needs capacity and energy from the Stations to meet its service obligations. However, it expects the amount of load it will be called upon to serve will decline as customers choose service from alternative providers. (Thone, ComEd Ex. 3.0 at 4-5). ComEd also expects that its obligation to provide generation services will decline over the next few years as services currently provided by ComEd are declared competitive. (See id.) ComEd further expects that demand-side resources, such as demand-side management programs, and load curtailment and conservation programs, will continue to reduce ComEd's needs for generating capacity. (Thone, ComEd Ex. 3.0 at 5; see also ComEd Ex. 9.0 at Ex. I, p. 3). Accordingly, ComEd assumes that its generation service obligations will decline over the next few years, thereby reducing or eliminating its need to find capacity and energy to replace its ownership of the Stations. Thone, ComEd Ex. 3.0 at 5.

ComEd presented a load and resource analysis which it believes demonstrates that, even if ComEd were to retain all of the customers in its service territory, it would have sufficient capacity available to meet that load while maintaining a reserve margin in excess of 17 percent over the next ten years. (Thone, ComEd Ex. 7.1 at 3-4). Staff witness Larson reviewed this analysis and concluded that "there will be sufficient capacity and import capability in ComEd's control area to provide tariffed customers with safe and reliable service." (Larson, Tr. 178).

ComEd states that its developing portfolio of generation resources will be more flexible than it has been. (Thone, ComEd Ex. 3.0 at 6). At least in the short-term, ComEd intends to rely upon purchased capacity and energy to a greater extent than it has historically. (Id.). ComEd believes that the PPAs that are part of the proposed transaction are a primary example of how it will use purchased power as a flexible means of meeting its service obligations. (Id.). The PPAs grant ComEd access to all of the capacity from the Stations, with the amount of capacity taken by ComEd allowed to decline -- at ComEd's option -- over the five-year term of the PPAs. See § II.B, supra; see also Thone, ComEd Ex. 3.0 at 6.

Accordingly, as provided in the PPAs, to the extent that ComEd needs the capacity, it will be available to ComEd. (E.g., Thone, ComEd Ex. 3.0 at 6). To the extent that ComEd will not need the capacity, ComEd will not be required to take or pay for it. However, ComEd stresses, the transaction gives it flexibility to change the sources of capacity from which it meets its service obligations if it is desirable to do so based on economics, sustained maintenance of reliability, or other pertinent considerations. (Id.). In contrast, ComEd avers, when it owns a generating facility, it must pay all the costs associated with that capacity whether it uses it or not. (Id.) Therefore, ComEd argues that it does not need to own the Stations to meet its obligations. (Id.).

Immediately following consummation of the proposed transaction, ComEd states it would have the following sources of capacity: (1) its nuclear-fueled generating stations; (2) a right to all of the capacity from the Kincaid and State Line Stations pursuant to existing power purchase agreements that extend through 2012; (3) additional firm wholesale agreements which provide over 900 megawatts of capacity through the summer of 2000 and 600 megawatts of capacity through the remainder of the transition period; (4) within ComEd's service territory, 87 megawatts of non-utility-owned capacity under contract to ComEd through various rates filed with the Commission; (5) contract rights under the PPA's to all the capacity and energy from the Stations, as ComEd may require, for a five-year period; and (6) purchase power directly from its customers pursuant to various tariffed programs. Furthermore, ComEd avers it will continue to evaluate its existing demand and resource situation and execute capacity transactions as needed to assure an adequate and reliable supply of electricity. Id. at 8-9, 11.

d.) The PPAs and reliability

ComEd testified that the PPAs contain numerous obligations and economic incentives for Mission to operate the Stations safely and reliably. (E.g., id. at 13; Manning, Tr. 186). Mission must ensure that the aggregate net dependable capacity of the generating units committed to ComEd equals or exceeds specified ratings. (E.g., Manning, ComEd Ex. 1.0 at 13). The capacity payments due under the PPAs will decline, or not be paid at all in a given month, if Mission fails to meet the high availability requirements in the PPAs. (E.g., id. at 13-14). Because the capacity payments due under the PPAs are significantly higher in the summer peak period -- e.g., eight times as high in the summer months versus the non-summer months under the Coal PPA -- failure to meet availability targets in the summer will be substantially more costly to Mission than it would be in non-summer months, thereby creating, in ComEd's view, a significant incentive for Mission to ensure that the Stations are available during the summer months when their capacity will be needed the most. E.g., id..

On the other hand, ComEd stated that if Mission achieves exceptionally high availability, capacity payments will be adjusted upward. (E.g., id. at 14). According to ComEd, because the capacity payments are greater in the summer months, the resulting upward adjustment would also be greater in the summer, thus providing additional incentives for Mission to ensure that the units are available during the season when they are most needed. (E.g., id.). The PPAs also prohibit planned outages during the summer months and grant ComEd the right to require Mission to make changes to the outage schedule to minimize system reliability risks throughout the year. E.g., id. at 15.

e.) Sources of capacity and energy after the PPAs terminate

After the PPAs terminate, ComEd expects to have new capacity available to it from a variety of sources. These sources include the 500 megawatts of generating capacity that Mission will be required to install within the City of Chicago no later than the fourth anniversary of the closing. (E.g., id. at 10). Pursuant to ComEd's right of first offer on this capacity, as provided in the Mission Agreement, Mission must offer firm, committed capacity from the new unit or units to ComEd before it can offer such capacity to any other potential purchaser and, if ComEd declines the offer, Mission may not offer it to any other entity on terms more favorable than the terms offered to ComEd. Id.; see also ComEd Ex. 9.0 at Ex. A, Tab 1, pp. 74-75.

ComEd further notes that, because the Stations are located in Northern Illinois, it would likely continue purchasing some of their capacity and energy, if available, at then prevailing market prices. (Id.). ComEd additionally expects that it will be able to purchase capacity and energy as needed from a robust market that will have developed during the term of the PPAs. (Thone, ComEd Ex. 3.0 at 12-13). ComEd expects that other utilities will continue to be a reliable source of wholesale generation capacity and that such capacity will be available to ComEd in the wholesale market. Thone, ComEd Ex. 3.0 at 11.

ComEd also claims that the cash resulting from the sale will allow it to fund projects that will substantially enhance its nuclear operations. (Berdelle, ComEd Ex. 2.0C at 5). In addition, ComEd testified it will use cash resulting from the sale to fund a variety of programs which promote energy conservation and renewable energy projects. These include the "MORES Pilot" that will promote long-term energy efficiency and reduce electric-powered cooling system peak demand through the use of customer-specific diagnostic studies and financial assistance, and the "Dimmable Ballast Rebate" program that will provide a financial incentive to customers who replace non-dimmable ballasts in conjunction with a curtailment program. See ComEd Ex. 9.0 at Ex. I, p. 3.

ComEd claims that independent power producers ("IPPs") are already beginning to play a much larger role in electric generation in Illinois and will produce significantly larger amounts of wholesale capacity and energy in the future. ComEd Ex. 3.0 at 11.

According to ComEd, experience in other jurisdictions demonstrates that, where there is competition in the energy market, IPP developers will invest in significant capacity development. Id. at 12-14. ComEd alleges there is already concrete evidence that developers are interested in building in Illinois. (Id. at 13, 14 & Ex. 3.1). In ComEd's view, the sale of the Stations will provide a strong signal that the Illinois generation market is truly open to competition. (E.g., ComEd Ex. 1.0 at 16-17; ComEd Ex. 4.2 at 5-6). ComEd stated that this will encourage new competitive entry into northern Illinois, both through the addition of new capacity in the region and new entry by marketers.

In addition, ComEd testified that the Coal PPA was specifically designed, in part, to encourage other entities to provide capacity and energy in the region by establishing economic incentives for ComEd to lessen its dependence on the Stations for needed capacity. Both the capacity and energy charges in the coal PPA for option capacity are priced significantly above what ComEd believes will be the capacity and energy charges prevailing in the market. ComEd Ex. 1.0 at 16-17. This pricing differential was established primarily to give alternate suppliers an incentive to enter the Illinois market - because ComEd will have an incentive to buy it from a lower-cost provider rather than exercise its option under the Coal PPA. Id. at 17. ComEd witness Baumol, an economist, concluded that this differential "clearly constitutes an invitation for entry by yet other generators." ComEd Exh. 4.2 at 12.

Finally, ComEd asserts that, if sufficient capacity is not being built in Illinois and ComEd is unable to replace the capacity of the Stations from other sources to meet its service obligations, it will ensure that the needed capacity is built. ComEd Exh. 1.0 at 17. ComEd stated that it owns a number of sites suitable for generating stations including the site of its retired Ridgeland Station and land that it will retain adjacent to the Waukegan Station. Id. If a need arises to replace capacity represented by the Stations, ComEd testified that it will develop the needed capacity itself on those or other appropriate sites. Id. at 17-18; Tr. 253-56 (Manning).

f.) Staffing and reliability

ComEd states that the Mission Agreement requires Mission to extend employment offers to ComEd's non-supervisory fossil division employees, in order to staff the Stations, before it hires from outside of ComEd. ComEd Exh. 9.0 at Ex. A, Tab 1, pp. 38-39; ComEd Exh. 1.0 at 12-13 (Manning). ComEd asserts that Mission has already made two rounds of offers to management personnel. ComEd believes that offers will begin to be made to union personnel before the closing date of the proposed transaction. Tr. 186 (Manning). The Mission Agreement requires that Mission make "commercially reasonable efforts" to make job offers 60 days prior to the closing. E.g., ComEd Exh. 9.0 at Ex. A, Tab 1, p. 38; Tr. 187-88 (Manning). ComEd states that Mission has already agreed that those offers will be at the same pay rate and substantially equivalent fringe benefits and terms and conditions of employment as are in effect at closing. ComEd Exh. 1.0 at 12; ComEd Exh. 9.0 at Ex. A, Tab 1, pp. 38-41. In addition, certain union members will be entitled to a "special payment" if they accept a job offer from Mission. Tr. 193-94 (Manning); ComEd Exh. 10.0 at 5 and Ex. 6D.

ComEd maintains it is very unlikely that a sufficient number of employees will decline Mission's offers of employment. ComEd Exh. 1.0 at 13; Tr. 191-93 (Manning). However, ComEd alleges, if a sufficient number of ComEd employees do not accept offers from Mission, there are individuals with the skill and expertise available to operate and maintain, or train others to operate and maintain, the Stations, and there is sufficient time in which to utilize these alternatives. Tr. 194-97 (Manning).

ComEd also asserts that Mission has substantial incentives to ensure that the Stations are staffed in a manner that will provide for safe and reliable service. ComEd observes that Mission will pay almost \$5 billion in cash for the Stations, and that Mission's primary, if not sole, source of revenue from the Stations, at least in the early years, will be through the PPAs with ComEd, which significantly reduce or eliminate capacity payments unless the Stations are operated at very high availability factors. Eg., ComEd Exh. 1.0 at 13-14. Accordingly, ComEd argues that Mission has every incentive -- and no disincentive -- to take all steps, including retention of an experienced workforce, necessary to reliably operate the Stations.

2. Staff's Presentation

Staff witness Larson initially testified that he lacked sufficient information to determine whether or not the proposed transaction would render ComEd unable to provide its tariffed service in a safe and reliable manner. Mr. Larson indicated that he wanted to review ComEd load and resource data. (Staff Ex. 3, p. 6). Thereafter, ComEd provided certain load and capacity information (ComEd Ex. 7.0, p. 2) in response to a Staff data request and Mr. Larson testified at hearing that the information permitted him to express a final opinion that, after the transaction, ComEd would be able to provide its tariffed serve in a safe and reliable manner. Tr. 177-78 (Larson).

Mr. Larson testified that, during the term of the PPAs, the operation of the Stations will not differ significantly from their operation as owned by ComEd. Staff Exh. 3, p. 6. Mr. Larson testified that various features of the PPAs appear to assure that ComEd will be able to provide safe and reliable service. Mr. Larson observed that, under the PPAs, ComEd is entitled to an amount of generating capacity from the Stations equal to their current monthly net dependable capacities, and ComEd has reserved certain amounts of capacity each year -starting at about 90% of total capacity and decreasing through the term of the PPAs. ComEd has the option to take the remaining capacity at higher prices. In Mr. Larson's judgment, this is not significantly different from what ComEd would received if it continued to own the Stations. Staff Exh. 3, p. 3.

Mr. Larson further testified that, after the expiration of the PPAs in 2004, ComEd will still be able to provide its tariffed services in a safe and reliable manner. Mr. Larson opined that, because the PPAs run through 2004, ComEd will have adequate time to make system improvements or to arrange for additional capacity. Mr. Larson

noted that ComEd will have other sources of generation capacity, including the output from its nuclear power plants, contractual rights to output from the Kincaid and State Line stations, the new capacity Mission is required to construct, and new generating capacity already planned and under construction in ComEd's control area. Staff Exh. 3, p. 5.

Staff witness Goldberger concluded that the commitments made in the Mission Agreement satisfy the obligations of section 16-128(c). Staff Exh. 1, p. 8-9. Ms. Goldberger further testified that both non-supervisory and supervisory employees who are not offered positions by Mission and do not take positions with ComEd are eligible for a transition package which includes medical coverage, life insurance coverage, and severance pay. Staff Exh. 1, p. 8-9.

3. The State's Presentation

The State did not present testimony. In briefs, the State declared that it would "neither specifically endorse or oppose the approval" of the subject sale. (State Initial Br. at 6.) However, the State alleged several bases for questioning ComEd's ability to meet its service obligations safely and reliably.

First, the State asserted that "ComEd's plan to have all of its nuclear units available during peak use periods over the whole of the next ten years is very optimistic. The difficulties ComEd has experienced in running its nuclear generation program are public knowledge..." (Id., at 10.) Second, the State challenged ComEd's prediction regarding the future availability of capacity from IPPs, contending that "not all of the facilities for which permits have been sought may ever be built...Such factors as an economic downturn, or decreased access to credit by IPPs, would doubtless profoundly effect [sic] the plans of IPPs to locate generating facilities in Illinois." Id., at 11.

Third, the State underscored ComEd's uncertainty concerning customer retention in the developing competitive electricity market. "[I]t is precisely this uncertainty that must be taken into account, to the extent possible, in the interests of safety and reliability." Id. Fourth, the State argues that after the five-year term of the PPAs, Mission will have no obligation to furnish capacity to ComEd. "Mission's ability and incentives to sell electricity generated by the plants outside of the ComEd control area may increase." Id., at 12.

The State acknowledges that the issues it raises may "resolve themselves through the advent of robust electricity competition in Illinois." Id. Nevertheless, as a preventive measure, the State recommends that the Commission gather information pertinent to ComEd's reliability and safety. Accordingly, the State proposes that any order approving the sale be conditioned upon a requirement that ComEd submit annual reports regarding (1) ComEd's nuclear generation, (2) the status of new generation, and (3) load and customer retention. Id. at 6, 16-17.

4. IBEW's Presentation

IBEW witness Starr testified that there are approximately 9200 members of Local 15, most of whom are employed by ComEd. IBEW Exh. 1. About 1200 of these employees work at the Stations. The IBEW has a Collective Bargaining Agreement with ComEd covering wages, fringe benefits and terms and conditions of employment, that runs from August 25, 1997 through March 31, 2001 ("Collective Bargaining Agreement"). Id. The Collective Bargaining Agreement states that ComEd shall, in the event of a sale or transfer of ComEd's stations, require the purchaser to assume the obligations under the Collective Bargaining Agreement. Id.

The Mission Agreement refers to a Memorandum of Understanding ("MOU") between ComEd and the IBEW, dated February 26, 1999, (ComEd Exh. 10), whereby ComEd agrees to require Mission to assume the obligations imposed by the Collective Bargaining Agreement. Mr. Starr testified that as of June 28, 1999, Mission had not signed the Collective Bargaining Agreement or any other document assuming the responsibilities of the Collective Bargaining Agreement. IBEW Exh. 1.

Mr. Starr expressed concern regarding the timing of Mission's assumption of the obligations of the Collective Bargaining Agreement. He asserted that the employees of the Stations "must know exactly the obligations and commitment of ComEd and Mission to the [Collective Bargaining] Agreement while deciding whether or not to accept employment with Mission." Id. He further alleged that the employees' acceptance of Mission's offerings "depends on their knowledge of the exact terms of their wages, fringe benefits and terms and conditions of employment prior to the transfer of ownership and not on or after the date of the transfer." Id.

According to Mr. Starr, if a sufficient number of the current Stations employees are not offered, or do not accept, employment by Mission, the safe and reliable operation of the Stations will be jeopardized. Id. He claimed that even under ComEd's present operation, "the operator and maintenance staff levels at the fossil plants have been reduced to, at best, minimally acceptable levels through retirement, early retirement packages, and resignations. Id. These circumstances, Mr. Starr avers, have "resulted in extremely high levels of overtime" at the Stations. Id. Accordingly, Mr. Starr charged that if a "large number of skilled operators and maintenance workers do not accept employment with Mission...there will be insufficient number of trained and skilled workers to operate and maintain the plants" and train new workers. Id.

The IBEW does not oppose the proposed transaction. Rather, the IBEW recommends that the Commission impose conditions in an Order approving the sale that would require Mission to: 1.) immediately assume the Collective Bargaining Agreement; 2.) reach agreement with the IBEW on a pension plan; 3.) reach agreement with the IBEW regarding fringe benefits that are substantially equivalent to the corresponding terms of the Collective Bargaining Agreement; and 4.) offer employment to all existing non-supervisory employees, under the terms and conditions of the

foregoing agreements, by no later than 60 days prior to September 30, 1999, the projected closing date of the proposed transactions. IBEW Initial Br., at 11.

5. The County's Presentation

The County did not present any testimony. Rather, it submitted into evidence ComEd's responses to data requests, some of which were supplied under a claim of confidentiality. ComEd submitted the capacity factors for each of the Stations for each of the past seven years, but stated that it did not know under what circumstances Mission would operate the stations at capacity factors higher than those of the past seven years. ComEd further answered that it could not estimate the higher capacity factors nor estimate the annual emission rate and tonnage for each station for Nitrogen Oxide, Sulphur Dioxide, Carbon Dioxide, HAPS and particulates. ComEd also stated the cost of the coal and transportation contracts Mission is assuming, the duration of the contracts and any amounts to be paid by ComEd as a condition of that sale.

ComEd also answered that it did not know what specific upgrades Mission intended to make as part of the "more than \$200 million in environmental enhancements" described by ComEd. Additionally, ComEd provided a list of the existing air pollution controls at the Stations, but averred it did not know what controls were proposed by Mission, what the anticipated capital and operating cost of such controls might be or the anticipated annual reduction in emissions and reduction that might be achieved during the ozone season.

ComEd also responded that Mission is not obligated to ComEd to spend any specific funds on planned environmental improvements and that ComEd does not know what specific environmental improvements Mission is planning. ComEd further stated that it does not know under what circumstances or conditions Mission would not reduce Nitrogen Oxide emissions by more than 50% within three years of the date Mission assumes control of the stations. ComEd also declared that it did not know what capacity factors for each Station are assumed for the goal of reducing Nitrogen Oxide emissions by more than 50%.

Additionally, ComEd identified the fires, explosions or other incidents that resulted in unplanned outages or emissions above permitted levels. A fire on July 28, 1990 at the Crawford Station was caused by a cable fault to ground which likely resulted from moisture in oil impregnated insulation. The unplanned outage lasted approximately 55 hours. A fire and explosion at the Joliet 6 Station on July 1, 1996 was caused by boiler air/flow controls malfunction. The unplanned outage lasted approximately 36 hours. A fire at the Will County Station on January 18, 1998 was caused by a coal dust explosion inside Bradford Breaker. The unplanned outage lasted approximately 41 hours.

The County did not refer to ComEd's data request responses in either of its briefings. Instead it argued that the Commission should require ComEd, before the

subject transaction is approved, to prove that it will provide environmentally safe service.

B. Strong Likelihood of Increase in Base Rates

Under section 16-111(d) of the Act, the test for determining whether an electric utility is entitled to an increase in base rates is whether "the 2-year average of its earned rate of return on common equity . . . is below the 2-year average for the same 2 years of the monthly average yields of 30-year U.S. Treasury bonds published by the Board of Governors of the Federal Reserve System in its weekly H. 15 Statistical Release or successor publication." 220 ILCS 5/16-111(d).

1.) ComEd's Presentation

Mr. Berdelle testified that ComEd prepared a projection of its ROE through 2004 both with and without the sale, using the methodology set forth in section 16-111(d). ComEd Exh. 2.0, pp. 6-7. For each of these two sets of projections (with and without the sale), ComEd prepared projections based on each of the most extreme load retention scenarios: (a) assuming ComEd retains all of its load, and (b) assuming ComEd retains none of its load. Mr. Berdelle testified that ComEd prepared projections of ROE based upon these two most extreme assumptions because the effect competition will have on customer loss and revenue attrition is uncertain. Mr. Berdelle explained that if ComEd would not be entitled to a rate increase under either of these most extreme scenarios, it would not be entitled to an increase at any level of customer loss between these two extremes.

According to Mr. Berdelle, his calculations demonstrated that it is unlikely, under either of the extreme scenarios posited, that ComEd's ROE would fall below the projected average yield of 30-year U.S. Treasury bonds. In his analysis, Mr. Berdelle utilized United States Treasury bond yields forecasted by Regional Financial Associates ("RFA"), whose Treasury bond forecasts are widely used by the financial community. (*Id.* at 9). As a result, Mr. Berdelle testified that there is not a strong likelihood that ComEd would be entitled to request an increase in base rates during the mandatory transition period as a result of the proposed transaction. ComEd Ex. 2.0, pp. 6-11.

Additionally, ComEd performed sensitivity analyses, comparing its projected earned returns to Treasury bond yields two statistical standard deviations higher and lower than RFA's forecast. *Id.* at 10. Because the forecasted yields are within the range of the historical yields used in the calculation of the standard deviations, there is a probability of approximately 95 percent that the actual Treasury bond yields will be within two standard deviations of the yields forecasted by RFA. *Id.* Mr. Berdelle stated that the sensitivity analyses confirmed the result of the base analyses: in no case does ComEd's earned return fall below the level of the bond yield and, thus, in no case

would ComEd be eligible to apply for a rate increase because of the sale of the Stations. Id. at 11 & Exh. 2.1.

2.) Staff's Presentation

Staff witness Nicdao-Cuyugan testified that she reviewed the Company's projected ROEs and likewise concluded that there is not a strong likelihood that ComEd would be entitled to request an increase in base rates during the mandatory transition period as a result of the proposed transaction. Staff Ex. 2, p. 3; Tr. 181-82. Ms. Nicdao-Cuyugan explained that ComEd's two-year average projected ROEs from December 31, 1999 through December 31, 2004 are much higher than the forecasted two-year average yields for 30-year U.S. Treasury bonds during that same two-year period. Ms. Nicdao-Cuyugan also noted that ComEd's two-year average projected ROEs are higher than both historical and current market rates for 30-year U.S. Treasury bonds, which she believes provides further assurance that there is no strong likelihood that the proposed transaction would result in ComEd being entitled to request a rate increase. Staff Exh. 2, pp. 3-4; Tr. 181-82

C. Accounting Requirements

Staff proposes that an Order approving the proposed transactions contain a requirement that ComEd comply with certain accounting procedures. (Staff does not request that its recommendation be made a condition of approving the sales.) Specifically, Staff proposed including language for this Order which would require ComEd to account for the proposed transaction by utilizing Account 102. Staff further recommends that ComEd file accounting entries with the Commission "showing the actual dollar values of the assets and liabilities transferred between [ComEd, Ull and Mission] at the time of transfer" within 60 days after the date of the transaction and to provide a copy of the filing to the Director of Accounting. Staff Br. at 14.

ComEd argues that, although Staff purports to rely on the Uniform System of Accounts ("USOA") to support its arguments, the rules for Account 102 (1) require only that proposed journal entries - as opposed to the final entries requested by Staff - be provided, and (2) require that such information be provided within 6 months, as opposed to 60 days as proposed by Staff. See 83 Ill. Admin. Code § 415.10 (adopting 18 CFR 101). ComEd does not oppose filing Staff's recommended accounting entries with the Commission within 60 days of the date of the transaction and providing a copy of the filing to the Director of Accounting. However, although Staff's proposed finding refers to Mission and Unicom Investment, Inc. as well as ComEd, ComEd presumes that Staff seeks only that information which is recorded on ComEd's books of account (i.e., the only books to which the USOA applies) and it is only that information which ComEd will provide without objection.

According to ComEd, in general, to record a sale of property, the appropriate account or accounts are credited in an amount that reflects the original cost of the property and the related accumulated depreciation account or accounts are charged. ComEd Ex. 6.0 at 2-3. Thus, Account 102 initially reflects the difference between the original cost credits and depreciation charges and the consideration received for the property. Id. at 3. A utility then asks the Federal Energy Regulatory Commission ("FERC") for approval of the entries that will be used to "clear" the amount recorded in Account 102 to the account or accounts which will ultimately be used to reflect the transaction. Id. Thus, Account 102 of the USOA "is a 'holding account' which is credited 'pending the distribution to appropriate accounts in accordance with electric plant instruction 5.'" Id. at 2.

ComEd intends to ask the FERC, within the next month, for advance approval of the entries that will be used ultimately to reflect the transaction. Id. ComEd witness Berdelle averred that the Securities Exchange Commission ("SEC") does not endorse Account 102 as a proper account for SEC recording purposes. Tr. at 37-38 (Berdelle). Because the proposed transaction may close as early as September 30, 1999, if ComEd does not receive the FERC's advance approval of its proposed accounting treatment, it may not receive FERC approval for the distribution of the amounts out of Account 102 by year end. Id. This would result in dramatically different financial statements, on the one hand, for SEC reporting purposes and, on the other hand, for FERC and Commission reporting purposes. Id. If, however, FERC approval is not obtained prior to the time the transaction is recorded on ComEd's books of account, Account 102 will be utilized pending such approval. Berdelle, ComEd. Ex. 6.0 at 3 (emphasis added).

ComEd states it is unaware of a situation in which the Commission has not acquiesced in accounting treatment approved by the FERC. Staff, nevertheless, recommends that ComEd seek approval of its proposed accounting treatment from the Commission as well as the FERC. In its Reply Brief, ComEd has agreed to submit to the Director of Accounting a request for approval of the proposed accounting at the same time that it requests such approval from the FERC and will account for the transaction in accordance with the ruling obtained. ComEd prefers that the accounting issues be addressed in this manner outside the boundaries of this proceeding. Accordingly, ComEd maintains that Staff's proposed ordering paragraph is unnecessary and the Commission need not address the issue in this Order.

VII. COMMISSION ANALYSIS AND CONCLUSIONS

A. Threshold Issues

Before the Commission can address the substantive issues raised by Staff and Intervenor, we must first consider two threshold questions - the burden of proof in

these proceedings and the Commission's authority to impose conditions upon approval of the proposed transactions.

1.) Burden of Proof

Each of the intervenors asserts that ComEd bears the burden of proving that the proposed transaction should be approved. ComEd would thus be required to show that the transaction will not render it unable to provide tariffed services safely and reliably and will not entitle ComEd to seek an increase in its base rates during the mandatory transition period. In contrast, ComEd argues that the burden of proof is on any party claiming that either of the grounds for prohibiting the transaction exist. For the reasons set forth below, the Commission concludes that the burden of showing sufficient ground for approval of the proposed transaction lies with ComEd.

Initially, the Commission observes that the burden of proof in a Section 16-111(g) proceeding is not explicitly allocated in the statute. From this, the State contends that the Legislature did not intend to re-allocate the burden of proof which, the State maintains, would normally be placed on ComEd. The Commission, therefore, will first consider where the burden of proof ordinarily lies in our proceedings.

The State analogizes to civil proceedings before the judicial branch, in which the burden of proof is placed on the party seeking relief. State Initial Br., at 5, citing People v. Orth, 124 Ill.2d 326 (1988). Putting it differently, the State avers that the burden of proof is *not* allocated to the party that would be entitled to a verdict if no evidence were offered. Id., citing Village of Park Forest v. Angel, 37 Ill.App. 3d 753 (1976). The State asserts that the foregoing principles apply in administrative proceedings, where "the plaintiff has the burden of proof, and relief will be denied if the plaintiff does not sustain the burden." Id., citing Iwanski v. Streamwood Police Pension Board, 232 Ill.App.3d 180 (1992). ComEd does not quarrel with the authorities cited by the State.

The County addresses the burden of proof in proceedings before this Commission in particular and cites Section 9-201 of the Act to support the conclusion that the burden is allocated to ComEd. County Initial Br., at 3. However, ComEd correctly replies that Section 9-201 governs proceedings concerning rates, charges and associated utility matters, but not proceedings reviewing the sales of generating units. ComEd Reply Br., at 20. While it is true that Section 9-201, by its terms, does apply to utility "contracts," that section involves application of the "just and reasonable" standard rather than the different standard (safe and reliable service/entitlement to a base rate increase) involved here. Accordingly, we conclude that Section 9-201 governs review of contracts addressing energy, capacity and related matters, not plant sales transactions under Section 16-111.

However, although Section 9-201 does not allocate the burden of proof in Section 16-111 proceedings, it does help the Commission determine where the burden would lie in other proceedings. While Section 9-201 concerns the justness and reasonableness of rates and charges associated with the output of an electric utility's generation facilities, Section 8-101 of the Act addresses the justness and reasonableness of those generation

facilities themselves. Specifically, Section 8-101 provides that every public utility "shall furnish, provide and maintain such service instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and public and as shall be in all respects adequate, efficient, just and reasonable." 220 ILCS 5/8-101. The Commission believes that in a proceeding governed by Section 8-101, the burden of proving the adequacy, safety, justness and reasonableness of its generation facilities after sale of its fossil-fuel plants would reside with ComEd. That burden under Section 8-101 parallels the burden under Section 9-201 of showing the justness and reasonableness of rates and charges for the output of generation facilities. In both instances, the burden is on the utility.

Similarly, Section 8-401 of the Act states that all public utilities "shall provide service and facilities which are in all respects adequate, efficient, reliable and environmentally safe and which, consistent with these obligations, constitute the least-cost means of meeting the utility's service obligations." 220 ILCS 5/8-401. The Commission believes the mandatory language of Section 8-401 would, like Section 8-101, impose the burden of proof with respect to the adequacy, reliability and safety of generation facilities on the subject utility.

The Commission further believes that under Section 7-102 of the Act, which preceded Section 16-111 and still applies to transactions not governed by the latter section, ComEd would also have the burden of proof with respect to plant sales. The mandatory language of that section¹ ADD FOOTNOTE, in the Commission's view, plainly obligates the utility to establish the basis for its proposed transaction.

Our interpretation of Sections 7-102, 8-101 and 8-401 of the Act, combined with the allocation principles cited by the State, leads us to the conclusion that ComEd would have the burden of proof under Commission law and practice preceding Section 16-111(g). The question, therefore, is whether Section 16-111 re-allocated that burden.

Although ComEd does not address the burden of proof under pre-existing law, it does argue that language of Section 16-111(g) implicitly places the burden of proof on opponents of the proposed transaction. ComEd contends that by granting the Commission only the power to "prohibit" the proposed transaction under certain specified circumstances, the Legislature intended to place the burden on proof on those parties asserting that the

¹ 220 ILCS 5/7-102 Transactions requiring Commission approval. Unless the consent and approval of the Commission is first obtained or unless such approval is waived by the Commission or is exempted in accordance with the provisions of this Section or of any other Section of this Act:

*

*

*

- (c) No public utility may assign, transfer, lease, mortgage, sell (by option or otherwise), or otherwise dispose of or encumber the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property, but the consent and approval of the Commission shall not be required for the sale, lease, assignment or transfer (1) by any public utility of any tangible personal property which is not necessary or useful in the performance of its duties to the public, or (2) by any railroad of any real or tangible personal property;

conditions for prohibition are present. ComEd Initial Brief, at 13. Furthermore, since Section 16-111(g) contemplates that the proposed transaction will be approved by default if the Commission did not require a hearing, ComEd maintains that it does not acquire the burden of proof merely because the Commission conducts a hearing. Id.

Moreover, ComEd avers that the burden of proof would require it "prove a negative" (for example, to prove that it will not be unable to provide safe and reliable service). ComEd Reply Br., at 19-20. In support of the proposition that a party cannot be compelled to "prove a negative," ComEd relies upon Snyder v Ambrose, 266 Ill. App. 3d 163, 166 (1994) and Williams v Franks, 11 Ill. App. 3d 937, 939 (1973), cited at Id., at 20.

The State counters that an implicit allocation of the burden of proof to opponents of the transaction would be inconsistent with certain language in Section 16-111(g). In particular, the State points to the requirement that the Commission enter an order "approving or prohibiting" the proposed sale within 90 days. State Reply Br. at 4. "If opponents of the sale truly had the burden of proof, this section would properly read 'prohibiting or declining to prohibit.'" Id. Staff makes a similar argument, stressing that Section 16-111(g) authorizes a plant sale "without obtaining any approval of the Commission other than that provided for in this section..." Staff Reply Br., at 3 (emphasis added in Staff's brief). The County cites this language as well. County Reply Br., at 2. Staff further contends that there are "repeated references to approval" in Subsection 16-111(g). Staff Reply Br., at 4. The import of these references, according to the intervenors, is that proceedings under Section 16-111(g) impose a duty on ComEd to make its case for approval.

Additionally, the State disagrees with ComEd about the significance of the fact that the proposed sale would be approved by operation of law in the event the Commission did not require a hearing. The State argues that the Legislature simply contemplated that the subject utility's Notice of Sale might, by itself, satisfy the Commission that grounds for prohibition were not extant. State Reply Br., at 3. However, the State avers, the Legislature also anticipated that the utility's notice might *not* satisfy the Commission, in which case the utility would have to show cause why the sale should not be prohibited. Id. Thus, any presumption that the Notice of Sale satisfies statutory requirements is "negated in this case by the Commission's decision to convene hearings, and its specific instruction to ComEd to show cause." Id.

The IBEW also argues that Section 16-111(g) places the burden of proof on ComEd, emphasizing the statutory requirement that the subject utility file "a description of how the electric utility will meet its service obligations under this Act in a safe and reliable manner." IBEW Reply Br. at 2, quoting Section 16-111(g)(vi). The IBEW views the foregoing language, along with the other filing requirements set forth in Section 16-111(g), as implicitly placing the burden of proof on the party making the filings.

The Commission concludes that ComEd does bear the burden of proof regarding the proposed sale. ComEd has placed too much reliance on the presence of the term "prohibit" in the statute, given that the term "approval" appears several times in the same

section. In view of this variation in the language employed, the Commission is not willing to conclude that the Legislature intended, in Section 16-111(g) proceedings, to re-allocate the customary burden of proof.

Further, while ComEd is correct that the statute limits the grounds on which approval of the transaction may be withheld, it does not follow that the burden with respect to the issues posed by the statute lies with intervenors. Indeed, there is no guarantee that any party will choose to intervene. In such case, the logical extension of ComEd's argument is that the Commission itself would bear the burden of disproving the adequacy of ComEd's filing. We do not believe this is what the Legislature intended. The Commission finds it consistent with the allocation of the burden of proof in other Commission proceedings, in administrative proceedings generally and in civil judicial proceedings to assign the burden of proof to the party that is both seeking relief and obligated to file supporting evidence for that relief.

Additionally, the Commission does not agree with ComEd that the burden of proof compels the utility to "prove a negative," as that phrase is used in the judicial opinions ComEd cites. The utility is not being required to, for example, disprove all hypotheses that might diminish the adequacy of its Notice of Sale. Under Section 16-111(g), the subject utility is simply required to do exactly what ComEd did here - present affirmative evidence of its projected safety, reliability and financial strength after the proposed transactions. The Commission notes that in its own prayer for relief, ComEd summarizes its case with the same "negative" language it decries - "The overwhelming evidence demonstrates that the proposed transaction will not result in either of the two circumstances under which the transaction may be prohibited..." ComEd Reply Br., at 22 (emphasis in original).

Finally, the Commission concludes that effective intervention would be a practical impossibility if the burden of proof were imposed on parties other than the subject utility. Section 16-111(g) establishes a 90-day review period for plant sales. That severely compressed schedule does not create substantial difficulties for the utility, which can wait until its proofs are fully marshaled before triggering the 90-day period by filing a Notice of Sale. In contrast, intervenors must review the utility's Notice (here, five large volumes, along with five volumes of direct testimony), conduct discovery and mount their responses within a span of time that does not impair the Commission's capacity to hold hearings, allow briefings and deliberate. The sparse presentations of the intervenors in these proceedings are a reflection of that schedule.

Without unambiguous statutory language, the Commission will not infer that the Legislature intended to render intervention even less effective - and even less likely - by allocating the burden of proof to intervenors. As the State points out, when the Legislature enacted Section 16-111(g), it also reaffirmed Illinois' "continued interest in the safety, reliability and affordability of electric power." State Initial Br., at 4, quoting 220 ILCS 5/16-101(A). Intervention is often essential to safeguarding those interests and the Commission does not conclude that the Legislature intended to place insurmountable obstacles in its path.

2.) Authority to Impose Conditions

In their briefs, the State, the IBEW and Staff each seek to impose various conditions on the approval of the sale of the coal plants. The State observes that Section 16-111 does not contain explicit authority to impose conditions, but argues that the Commission has such authority under its "plenary powers" over utilities, derived from Sections 4-101 and 8-401 of the Act. State Initial Br. at 6-8.

Section 4-101 states, in pertinent part, that the Commission "shall have general supervision of all public utilities, except as otherwise provided in the Act..." 220 ILCS 5/4-101. The State cites Abbott Laboratories Inc. v. Commerce Comm'n, 289 Ill. App. 3d 705 (1st Dist. 1997) ("Abbott Labs"), where, according to the State, the court recognized the Commission's "plenary power" under Section 4-101. State Initial Br., at 7.

Pursuant to Section 8-401, utilities must "provide services, and facilities which are in all respects adequate, efficient, reliable and environmentally safe ." 220 ILCS 5/8-401. That State contends that since the obligations imposed on ComEd by Section 8-401 will continue after the proposed sale, the Commission's power to request information regarding ComEd's performance will not be altered by that sale.

The State also cites Section 5-109 of the Act, under which utilities must submit certain information to the Commission. The State alleges that "the conditions proposed by the PEOPLE [sic] are reporting requirements, fully within the scope of Section 5-109." State Initial Br., at 8.

ComEd opposes these arguments. ComEd cites Business and Professional People for the Public Interest v. Illinois Commerce Commission, 136 Ill. 2d 192, 243-44 (1989) for the proposition that the Commission's powers are limited to those expressly provided to it by the Legislature. Thus, ComEd asserts, the Commission acts without jurisdiction when it exceeds the authority specifically granted to it. ComEd Reply Br., at 4. ComEd notes the State's acknowledgement that Section 16-111(g) does not explicitly authorize the Commission to condition its approval of a transaction. ComEd then asserts that, such authority cannot be derived from the Commission's general powers either. According to ComEd, where the Legislature intended to allow the Commission to impose conditions on its approval of a transaction, it did so explicitly. See, e.g., 220 ILCS 5/4-502(d)(3), 6-102(b), 7-101(3), 7-102, 7-103(c), 7-204(f).²

² 220 ILCS 5/4-502(d)(3) (A "capable public utility" is one which "agrees to . . . the terms and conditions contained in the Commission order approving the acquisition[.]"); 6-102(b) ("The Commission may by its order grant permission for the issue of such stock certificates, or bonds, notes or other evidences of indebtedness . . . and may attach to the exercise of its permission such condition or conditions as it may deem reasonable and necessary."); 7-101(3) (In approving certain transactions with affiliates, the Commission "may condition such approval in such manner as it may deem necessary to safeguard the public interest."); 7-102 (In approving certain transactions, the Commission may "attach[] such conditions as it may deem proper[.]"); 7-103(c) (In approving certain dividend payments "the Commission may grant such authority upon such conditions as it may deem

Therefore, ComEd contends, where, as in Section 16-111(g), no such explicit authority can be found, the Legislature did not intend to grant that authority to the Commission.

Indeed, ComEd reasons, if the Commission had general authority to impose conditions on its approval of transactions, the numerous statutory provisions which explicitly provide for that authority would be superfluous. Such a result would be contrary to the rule of statutory construction that a statute should be construed so as to avoid any portion being rendered superfluous. See, e.g., Patteson v. City of Peoria, 386 Ill. 460, 463 (1944) ("A cardinal rule in the construction of a statute is that it should be so construed, if possible, that no word, clause or sentence is rendered superfluous or meaningless"); Bethania Assoc. v. Jackson, 262 Ill. App. 3d 773, 779-80 (1994). Based on the foregoing principles, ComEd concludes that because Section 16-111(g) contains no authority to impose conditions, it must be presumed that the General Assembly intended to grant none.

Next, ComEd alleges that neither of the statutes cited by the State (Sections 4-101 and 8-401 of the Act) grants the Commission any "substantive authority." ComEd Reply Br., at 5. Rather, ComEd states, Section 4-101 only grants the Commission "general supervisory authority" over public utilities, which is insufficient to provide any substantive regulatory authority that is not specifically granted elsewhere in the Act. Id., citing City of Geneseo v. Illinois N. Utilities Co., 378 Ill. 506, 522 (1941); see also East St. Louis, Columbia Waterloo Ry. v. East St. Louis and Carondelet Ry. Co., 361 Ill. 606, 615 (1935). Similarly, ComEd contends that Section 8-401 only imposes a duty on utilities with respect to their service obligations and does not grant any specific authority to the Commission.

The ComEd challenges the State's reliance on Abbott Labs, which ComEd says "stands only for the unremarkable proposition that the Commission has plenary powers when it exercises its broad authority to set rates. Here, however, the statute does not grant the Commission broad authority regarding transactions subject to Section 16-111(g), but instead expressly limits the Commission's authority to the consideration of two specific issues." ComEd Reply Br., at 6.

ComEd additionally maintains that the Act provides the Commission with other mechanisms for obtaining the information identified by the State here. ComEd cites Section 16-130, which requires utilities to provide information regarding the impact of open access, "including some of the information included in the Attorney General's proposed reporting requirements." Id. ComEd states, however, that if the Commission desires additional related information, Section 16-130 requires that such an obligation be imposed "by rule." 220 ILCS 5/16-130(1)(E). Therefore, ComEd claims, "where, as here, the Act provides the Commission with a variety of specific procedures under which it may, in an appropriate case, obtain the information sought by the Attorney

necessary to safeguard the public interest."); 7-204(f) ("In approving any proposed reorganization pursuant to this Section the Commission may impose such terms, conditions or requirements as, in its judgment, are necessary to protect the interests of the public utility and its customers.")

General, those procedures may not be subverted through use of a different grant of authority, such as its authority to approve transactions under Section 16-111(g)." Id., citing Hernon v. E. W. Corrigan Construction Co., 149 Ill. 2d 190, 195 (1992); Monarch Gas Co. v. Commerce Commission, 261 Ill. App. 3d 94, 100 (1994).

Similarly, ComEd argues that an agency may not condition its approval upon some matter that requires proceedings under another provision of the Act (e.g., such as the audit required by Section 8-102 or the rulemaking required by Section 16-130). ComEd cites Citizens Utilities Co. v. Pollution Control Bd., 9 Ill. App. 3d 158, 165 (1972), in support of this argument.

The Commission generally concurs with ComEd that Section 16-111(g) "provides the full criteria under which a subject transaction may be considered." ComEd Reply Br., at 5. That does not mean, however, that the Commission is precluded from attaching conditions reasonably related to those criteria. The Legislature vested us with sufficient power to prohibit plant sales in the event that we made certain findings pertaining to the named public interest factors. The Commission believes that the authority to take lesser action, in order to implement Section 16-111, is inherent in the greater authority to prohibit the proposed sale altogether. It is a "well established rule that the express grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature's objective." Abbott Laboratories v. Illinois Commerce Commission, 289 Ill.App.3d 705, 682 N.E.2d 340, 224 Ill.Dec. 779, 786 (1997).

Accordingly, we conclude that the Commission has authority to attach conditions to its approval of the proposed transactions, so long as such conditions bear a reasonable relationship to the specific public interest factors identified in Section 16-111. We do not need to resolve the debate about our plenary power under the Act in order to reach this conclusion. The Commission believes that the authority to impose conditions is inherent in our power to implement Section 16-111.

Furthermore, while ComEd accurately states that Section 16-111 sets out only two grounds for prohibiting the proposed transaction, its arguments ignore the significance of the panoply of detailed requirements imposed on a subject utility by the same statute. For example, subsection 16-111(g)(iv) requires "an irrevocable commitment by the electric utility that it will not, as a result of the transaction," impose stranded cost charges or increase the transition charges it might otherwise collect. In the event a subject utility did not make the necessary "irrevocable commitment," the Commission would be unable, under ComEd's limited view of our authority, to require such commitment as a condition upon our approval of the proposed transaction. Moreover, absent a finding concerning safety, reliability or entitlement to a base rate increase, the Commission could not prohibit the proposed transaction, even if the subject utility failed to provide the requisite commitment.

Consequently, as already stated, the Commission finds that our authority under Section 16-111 includes the power to impose conditions as necessary to effectuate that

statute. Abbott Laboratories, supra; Lake County Board of Review v. Property Tax Appeal Board, 119 Ill.2d 419, 519 N.E.2d 459, 116 Ill. Dec. 657 (1988).

It follows that the Commission rejects ComEd's assertion that we can only impose conditions when expressly authorized in specific sections of the Act. Historically, the Commission has attached conditions to its orders as necessary to carry out its duties under the Act. Relatively few of those conditions have resulted from express grants of authority to impose conditions. That is to be expected, given that many of the statutes implemented or enforced by the Commission contain broad language concerning, as here, reliability and safety. We have no doubt that the Legislature intends for the Commission to give life to those broad mandates with specific conditions where necessary.

The Commission further notes that what ComEd posits is an all-or-nothing regulatory regime, in which the Commission would have no choice but to prohibit the proposed sale unless it were free of doubt concerning ComEd's ability to provide safe, reliable service and maintain its return on equity. The subject utility would then have to refile its Notice of Sale, along with new evidence regarding any matter the Commission found in need of additional support. We do not believe this is what the Legislature intended. With the flexibility to attach appropriate conditions, the Commission can obviate the need for repetitive filings that will only delay the utility's business plan and burden the Commission with additional proceedings. Accordingly, since the statute does not expressly bar the Commission from placing conditions on plant sales, we will not infer that the Legislature intended to prevent our doing so.

As for ComEd's claim that we lack authority to attach a reporting requirement as a condition of sale because certain information might be available under sections of the Act other than Section 16-111, the Commission is particularly unconvinced. As discussed above, Section 4-101 of the Act charges us with "general supervision of all public utilities" and requires that we "examine those public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect their compliance with this Act and any other law, with the orders of the Commission and with the charter and franchise requirements." 220 ILCS 5/401. Accordingly, the Commission has no doubt that its power to compel the presentation of information is broad and general, not narrowly linked to discrete and mutually exclusive sections of the Act.

B. Safety and Reliability

1.) The Attorney General's Proposed Reporting Requirements

The State recommends that the Commission include certain reporting requirements as conditions to any Order approving the proposed transactions. As a

foundation for its recommendations, the State questions the availability and past performance of ComEd's nuclear generating facilities and the availability of alternate sources of generation capacity. The State also raises the possibility that ComEd may retain more of its load than it predicts. ComEd responds that none of these conditions is supported by evidence in the record.

The State claims, and asks the Commission to find, that ComEd's resource planning "assumes that its nuclear generating facilities will in all cases be available and will function reliably during peak use period during the next decade." State Initial Br., at 15. ComEd counters that its load and resource analysis does not rest upon the assumption. Instead, ComEd states, its analysis demonstrates that, over the next ten years, ComEd will have more than a 17 percent reserve margin in each year. ComEd Exh. 7, at 4. The events against which the reserve margin is intended to protect include forced outages at generating units, weather and load variation. Tr. 114-17 (Thone). ComEd points out that the Commission, in a ComEd rate case, found that these factors were prudently accounted for by a reserve margin of only 15 percent. Commonwealth Edison Co., Ill. C.C. Dkts. 87-0427 et al. (cons.) (on Remand) at 42 (Feb. 14, 1993).

The State also argues that ComEd's assumptions regarding the intentions of independent power providers ("IPPs") "may be rather optimistic" and suggests a number of events could occur which would cause generation to not be built. State Initial Br., at 10-11. ComEd responds that there is no evidence to support the State's contentions. ComEd claims that it did not assume significant new building in its load and capacity analysis. Moreover, according to ComEd, even if none of the minimal amount of projected new capacity were built by IPPs or anyone else, ComEd's reserve margin would still be above 17 percent through 2006. Further, ComEd's reserve margin calculations as set forth on Exhibit 7.1 are conservatively biased downward because they do not include the new sources of capacity described in the direct testimony of ComEd witness Thone. ComEd Ex. 7.1 at 4 (last note on page); Thone, ComEd Exh. 3.0 at 10.

The State additionally asserts that ComEd may retain "much more of its load than it assumes." State Initial Br., at 11. ComEd answers that its load and resource analysis assumes that ComEd will remain responsible for serving 100 percent of the load in its control area as that load may grow in the future. ComEd Exh. 7.1, at 3. In ComEd's view, this analysis demonstrates that sufficient capacity is available to ComEd even in the extreme and improbable case that ComEd loses no load as a result of competition. Id. Because ComEd has sufficient capacity to meet its customers' generation requirements under this extreme scenario, it will also have capacity to meet the needs of any lesser amount of load it is actually called upon to serve. Id. Staff witness Larson agreed. See ComEd Exh. 7.1 at 1 (Item B); Tr. 177-78 (Larson).

The State also stresses that ComEd's PPAs with Mission extend only five years, after which "Mission can do substantially as it pleases with the capacity of the plants. This

introduces another significant element of uncertainty into this transaction." State Initial Br., at 12.

Staff does not support the State's proposal to attach reporting requirements as a condition for approving the transactions. Staff maintains that "the Commission may require ComEd to produce relevant information at any time." Staff Reply Br., at 6. Staff also cautions that the proposed condition "would needlessly call into question the finality of the Commission's order in a manner Staff perceives as inconsistent with the legislative intent behind Section 16-111(g)." *Id.* However, Staff indicated it has no objection to the State's recommendation so long as reporting requirements are not made a condition of approval of the proposed transactions.

The Commission will accept Staff's recommendation to leave our approval of the proposed transactions unencumbered by a condition requiring annual reports. Nevertheless, the Commission believes that certain information identified by the State will be useful to monitoring customer demand and the development of competition in ComEd's service territory. As the agency assigned the responsibility of overseeing the transition to a competitive retail electricity market, along with the duty to monitor system reliability, it is prudent that the Commission keep abreast of trends regarding customer load and demand. Accordingly, we will require ComEd to file the customer retention and load data described by the State, although this requirement will be independent from our approval of the plant sales.

At present, however, the Commission will not require ComEd to provide the other information the State recommends. ComEd's nuclear performance is reported to the Nuclear Regulatory Commission and we have reviewed those reports on many occasions and will continue to do so. We also decline to require ComEd to gather and file information concerning the activities of independent power producers.

2.) IBEW's Staffing Issues

The IBEW requests that the Commission require Mission, the proposed buyer of the Stations, to take the following steps: a.) promptly assume the IBEW-ComEd Collective Bargaining Agreement; b.) immediately reach an agreement with the IBEW concerning benefits, pension plan and other conditions of employment, as set forth in the ComEd-IBEW MOU of February 26, 1999; c.) make offers of employment to all of the approximately 1,200 existing non-supervisory workers at the Stations. IBEW asserts that these measures are necessary so that a sufficient number of workers will accept such offers, thus ensuring safe and reliable Station operation. IBEW notes that Mission has not yet adopted the Collective Bargaining Agreement and has not made offers of employment, pension or other benefits to any of the Stations' non-supervisory workforce. IBEW fears that if more time elapses before such offers are made, a sufficient number of employees will not accept and continued safe and reliable service will not be assured when the transaction is consummated.

ComEd argues that IBEW's concerns are unwarranted since Mission has already made two rounds of offers to management personnel and is expected to begin making offers to union personnel before the closing date. ComEd maintains there is no evidence that Mission will not comply with Asset Sale Agreement and make the offers within 60 days of the closing date. To the contrary, ComEd claims, there is evidence showing that it is unlikely that a sufficient number of employees will decline Mission's offers. Further, ComEd asserts that if a substantial number do decline, there are individuals with the expertise to operate and/or train others to operate the stations.

ComEd also argues that the February 26, 1999 MOU between the union and ComEd does not require Mission to extend offers of employment to all of ComEd's non-supervisory employees. Moreover, ComEd asserts, disagreements regarding the MOU are "purely a matter of federal labor law and may not be addressed by the Commission." ComEd Reply Br., at 11-12, citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210 (1985); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co., 369 U.S. 95, 102-04 (1962); Commonwealth Edison Co v International Brotherhood of Electrical Workers, Local Union No.15, 961 F. Supp. 1154, 1161-65 (N.D. Ill. 1996).

Additionally, ComEd contends that the stations could be operated safely by less than the current workforce if staffing levels were lowered as a result of investment in technology. Staffing could also be affected, ComEd claims, by the manner in which the stations are operated and by the amount of work done by independent contractors.

ComEd further notes that that IBEW does not oppose consummation of the proposed transaction, which it would do if safety and reliability could not be assured. ComEd also argues that IBEW's contentions concerning an insufficient number of employees accepting Mission's offer is a mere conclusion, contradicted by record evidence that the vast majority of the workforce is well under typical retirement age. Furthermore, ComEd believes the approximately \$5 billion Mission is paying for the stations is a sufficient incentive to ensure that the stations are properly staffed to provide safe and reliable service.

Finally, ComEd disagrees with the IBEW's contention that Section 16-128(c) requires inclusion of IBEW's proposed conditions in a Commission Order approving the plant sales. In ComEd's view, Section 16-128 only provides that "the electric utility's contract and/or agreements with the acquiring entity or persons shall require that the entity or persons hire a sufficient number of non-supervisory employees to operate and maintain the station." ComEd Reply Br., at 12-13 (emphasis added by ComEd). ComEd states that the Mission Agreement contains the requisite language and no party has claimed to the contrary. ComEd Exh. 9.0, Ex A, Tab 1, pp. 38-39; ComEd Exh. 1.0 at 12-13.

The Commission does not have authority to impose requirements on Mission, the proposed buyer of the Stations. Mission is not presently an Illinois public utility and

Section 16-111(g)(4)(vi) of the Act states, among other things, that “An entity to which an electric utility sells, assigns, leases or transfers assets pursuant to this subsection (g) shall not, as a result of the transactions specified in this subsection (g), be deemed a public utility as defined in Section 3-105.” Moreover, Mission is apparently not, at least at present, an Alternative Retail Electricity Supplier within the meaning of Section 16-102 of the Act. Therefore, Mission is not subject to the Commission’s jurisdiction and cannot be compelled by us to take the steps the IBEW requests.

Since ComEd is subject to the Commission’s jurisdiction, however, we must decide whether any of the IBEW’s recommended conditions can and should be imposed on ComEd to assure safe and reliable operation of the Stations after sale or accomplish the objectives of Section 16-128 of the Act. The Commission agrees with ComEd that disputes arising under the ComEd-IBEW collective bargaining agreement and MOU are labor matters that belong in another forum. Accordingly, we cannot impose conditions to enforce either party’s rights under those agreements. Implementation and enforcement of Section 16-111 and 16-128 of the Act, on the other hand, are the responsibility of this Commission, and we have the authority to impose conditions reasonably related to those purposes.

In practical terms, if the Commission were to impose on ComEd the conditions recommended for Mission, we would allow ComEd to complete the proposed transactions only in the event the following circumstances were present - Mission’s acceptance of the collective bargaining agreement, an agreement between the IBEW and Mission concerning a pension plan and other benefits, and the presentation of employment offers by Mission to all existing non-supervisory employees at the Stations. The Commission does not believe that we have the power to impose such conditions, even pursuant to our authority to implement and enforce Sections 16-111 and 16-128 of the Act. ComEd is correct that Section 16-128 mandates only that “the electric utility’s contracts and/or agreements with the acquiring entity” contain certain requirements with respect to hiring existing non-supervisory employees. So long as the requisite contract terms are present, the electric utility has fulfilled its statutory duty and is not required to secure compliance with those terms before a sale can be approved.

ComEd has demonstrated that some, but not all, of the necessary provisions have been included in the Mission agreement. Mission has agreed to assume the ComEd-IBEW collective bargaining agreement as of the closing date of the sales. ComEd Exh. 9, Exh. A, Vol. 1, p. 38. Within the terms of the Mission agreement, “collective bargaining agreement” is defined to include provisions of the ComEd-IBEW MOU, which contains pension and benefit requirements. *Id.*, at 3. Therefore, ComEd has met its statutory obligation to place mandatory terms regarding those matters in the subject agreement.

However, ComEd has not placed a requirement in the Mission agreement that the buyer extend an offer of employment to all existing non-supervisory employees at the Stations. Section 16-111(g)(4) requires an electric utility selling assets to comply

with Section 16-128 (c) and (d). Section 16-128(c) states in relevant part that “[i]n the event of a sale...during the mandatory transition period of...generating stations and/or generating units, of an electric utility, the electric utility’s contract and/or agreements with the acquiring entity...shall require that the entity hire a sufficient number of non-supervisory employees to operate and maintain the station...by initially making offers of employment to the non-supervisory workforce of the electric utility’s generating station and/or generating unit at no less than the wage rates, and substantially equivalent fringe benefits and terms and conditions of employment that are in effect at the time of the transfer of ownership...” 220 ILCS 5/16-128 (C) (emphasis added).

While the foregoing statutory language is incorporated into the Mission Agreement, at ComEd Exh. 9, Exh. A, Vol. 1, p. 38, ComEd insists it does not - and need not - constitute a requirement to offer employment to all non-supervisory employees. The Commission’s disagrees. We believe that the underscored statutory language in the preceding paragraph embraces all non-supervisory employees presently employed at the Stations. The Commission notes that Section 16-128 is predicated on certain legislative findings:

- (1) The reliability and safety of the electric system has depended on a workforce of skilled and dedicated employees, equipped with technical training and experience.
- (2) The integrity and reliability of the system has also depended on the industry’s commitment to invest in regular inspection and maintenance, to assure that it can withstand the demands of heavy service requirements and emergency situations.
- (3) It is in the State’s interest to protect the interests of utility employees who have dedicated themselves to assuring reliable service to the citizens of this State, and who might otherwise be economically displaced in a restructured industry.

220 ILCS 5/16-128 (A)(1)-(3). In view of these findings, the Commission concludes that the protections afforded customers and non-supervisory employees by Section 16-128 would be undermined if “workforce” were construed to mean less than the entirety. If all non-supervisory employees are not included in that term, then the number of such employees that would be included is unknowable, and no non-supervisory employee has an enforceable right. The Commission does not believe that the Legislature, in choosing the collective noun “workforce,” intended that result. Accordingly, the electric utility must include the full protection of Section 16-128 in a plant sales agreement under Section 16-111.

The Commission further observes that the Legislature did not use the terms “non-supervisory workforce” or “non-supervisory employees” to identify those persons to whom the electric utility must offer a transition plan. Rather, in Section 16-128 (c),

the Legislature stated that the utility “shall offer a transition plan to those employees who are not offered jobs by the acquiring entity because that entity has a need for fewer workers.” 220 ILCS 5/16-128(c) (emphasis added). ComEd and Mission acknowledge the distinction between non-supervisory employees and other employees in the Mission Agreement (e.g., “Purchaser shall be responsible for (i) all liabilities, obligations and commitments relating to all wages, salaries, bonuses and other forms of compensation (including vacation pay) and related expenses incurred or accrued on or after the Closing Date with respect to Transferred Non-Supervisory Employees and other ComEd employees hired by the purchaser on the closing date (such employees and the Transferred Non-Supervisory Employees being referred to herein collectively as the ‘Transferred Employees’)...” ComEd Exh. 9, Exh. A, Vol. 1, p. 40 (emphasis added).

The Commission concludes, therefore, that the Legislature intended that there be a provision in a contract for the sale of generating units requiring that all “non-supervisory employees,” apart from other employees of the electric utility, would receive employment offers from the purchaser. Other employees must also be protected, by a contractual obligation to provide a transition plan, which the Mission Agreement contains. The Commission emphasizes that our conclusions are not derived from or based on an interpretation of the ComEd-IBEW collective bargaining agreement and MOU. As stated above, the provisions, rights and responsibilities contained in those agreements are subject to labor law and not part of our jurisdiction. Our conclusion is derived solely from the Commission’s judgment with respect to the meaning of Sections 16-111 and 16-128 of the Act.

Consistent with the foregoing analysis, the Commission will condition its approval of the proposed transactions upon ComEd’s showing that the Mission Agreement contains a provision by which employment offers will be made to all non-supervisory employees presently employed at the Stations.

4. Cook County's Arguments Concerning Environmental Issues

The County has not proposed any specific conditions on the sale. Rather, the County asserts that approval of the plant sales should be withheld until ComEd meets its burden of proving “that the proposed sale will allow ComEd to provide environmentally safe service.” County Initial Brief, at 2. The County insists that the “record is void of evidence” showing that ComEd will provide such service. *Id.* Specifically, the County complains that ComEd’s evidence does not show that the energy ComEd will purchase from Mission under the PPA’s will be “environmentally safe,” that existing pollution controls at the Stations “will be sufficient to handle the PPA’s,” or that Mission will comply with environmental laws. *Id.*, at 3-4. The County also avers that the measures ComEd will take to assure system reliability will not necessarily assure environmental safety. County Reply Br., at 3-3.

ComEd responds that "environmental issues are wholly irrelevant to this proceeding" and analyzes Section 16-101A of the Act to demonstrate that "environmentally safe," as that term appears in Section 16-101(A) is not "coterminous" with "safe," as that term appears in Section 16-111(g). ComEd Reply Br., at 18-19. ComEd also denies that it has the burden of proof in these proceedings. *Id.*, at 19. The Commission rejects both arguments. The former argument disregards the public interest. The Commission believes that environmental safety is included within the "safe" service requirement of Section 16-111(g). The latter argument has already been addressed elsewhere in this Order.

The Commission agrees with ComEd, however, that the record, contrary to the County's claims, contains sufficient evidence that ComEd will not be unable to provide safe service. The record shows that Mission, like all other operators of generation, will be required to comply with all applicable environmental laws and regulations. There is no evidence that it will not do so and there is no evidence that anything more is required in order for the energy purchased by ComEd under the PPAs to be environmentally safe.

It is, in fact, the County's allegations concerning the PPAs that lack supporting proof. The County supplies no evidence that ComEd's fossil-fueled Stations are presently in violation of applicable environmental laws, or that Mission has failed to conform to environmental requirements in other jurisdictions. Thus, the County raises no inference that operation of the Stations, upon transfer to Mission, is likely to jeopardize environmental safety. ComEd, on the other hand, has established that Mission is an experienced and reliable operator of electricity generation units. ComEd Exh. 1.0, at 5-7.

Accordingly, the County has not overcome ComEd's showing that the proposed transaction will not render ComEd unable to provide tariffed services in a safe and reliable manner.

C. Likelihood of Eligibility for a Base Rate Increase

ComEd presented analyses demonstrating that its return on equity after the proposed transactions would not diminish to a point at which ComEd would be entitled to seek an increase in its base rates. ComEd tested its projections under extreme scenarios of load retention and with substantial deviation in the yield of the 30-year Treasury Bond. Staff found no flaw in ComEd's methodology and no other party addressed this issue.

Under Section 16-111(g), the standard for prohibition of the proposed transaction requires a "strong likelihood" that the electric utility will become entitled to a rate increase. The evidence here does not suggest any such likelihood. In an abstract sense, it is conceivable that ComEd's reliability could become so deficient after the proposed sale that its ability to realize return on equity would be severely compromised. There is no record evidence, however, to support that supposition. Accordingly, the Commission finds no basis for prohibiting the proposed transaction on

the ground that ComEd, as a result of the transaction, is strongly likely to become entitled to a base rate increase during the mandatory transition period.

D. Staff's Accounting Issue

Staff recommends that ComEd file journal entries recording the sale with the Commission in accordance with the instructions for Account 102 of the USOA and provide the entries to the Director of Accounting. Staff's concern is that ComEd intends to seek an exemption from the FERC concerning Account 102 and will treat such exemption, if granted, as a waiver of this Commission's parallel rule, contained in 83 Ill. Adm. Code 415.

ComEd's concern is that without the FERC's advance approval of its proposed accounting treatment, it may not receive FERC approval for distribution of the amounts out of Account 102 by year end. This will result in different financial statements for SEC reporting purposes and for FERC and Commission reporting purposes.

ComEd has agreed to seek from the Director of Accounting approval of the proposed accounting at the same time that it requests approval from the FERC. ComEd also does not oppose filing the accounting entries with the Commission within 60 days, as opposed to the six months required by 83 Ill. Adm. Code 415, and providing a copy to the Director of Accounting.

Our rule is distinct from the FERC's, though the two are nearly identical, and compliance is required. We will adopt Staff's recommendation that the Commission order ComEd to record the journal entries reflecting the transaction in Account 102 of the USOA, consistent with 83 Ill. Adm. Code 415. ComEd's final accounting entries should present, within 60 days after the date of the transaction, the actual dollar values of the assets and liabilities transferred. A copy of the filing should also be provided to the Director of Accounting.

Since ComEd intends to seek FERC's approval of its proposed accounting treatment "within the next month," ComEd Exh. 6.0, at 3, compliance with our accounting rules will not delay ComEd's activities at the FERC. If a FERC ruling renders the use of Account 102 unnecessary, ComEd can so advise the Commission at that time. In either case, the Commission does not regard compliance with our filing requirement as a condition on our approval of the proposed transactions.

VIII. COMMISSION FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, and being fully advised in the premises, is of the opinion and finds that:

- (1) ComEd is an Illinois corporation engaged in the production, transmission, sale, and delivery of electricity to the public in the State of Illinois, and is a public utility within the meaning of Section 3-105 of the Act (220 ILCS 5/3-105) and an electric utility within the meaning of Section 16-102 of the Act (220 ILCS 5/16-102);
- (2) the Commission has jurisdiction over ComEd and the subject matter of this proceeding;
- (3) the findings of fact and law and the conclusions thereon stated in the prefatory portion of this Order are supported by the record and are incorporated herein by reference;
- (4) ComEd's Notice filed May 13, 1999 is in compliance with the requirements of Section 16-111(g) of the Act;
- (5) the evidence establishes that the proposed transaction will not render ComEd unable to provide its tariffed services in a safe and reliable manner;
- (6) the evidence establishes that there is not a strong likelihood that consummation of the proposed transaction will result in ComEd being entitled to request an increase in its base rates during the mandatory transition period (i.e., prior to January 1, 2005), pursuant to section 16-111(d) of the Act;
- (7) ComEd has not complied with the requirement of Section 16-128(c) of the Act, in that the Mission Agreement does not obligate the buyer to extend offers of employment to all members of the non-supervisory employees workforce at the Stations at no less than the wage rates and substantially equivalent fringe benefits and terms and conditions of employment that are in effect at the time of the transfer of ownership, and that such wage rates and substantially equivalent fringe benefits and terms and conditions of employment shall continue in effect for at least 30 months from the date of transfer unless an agreement is reached with the collective bargaining units to different terms and conditions of employment within that 30-month period;
- (8) except as provided in the preceding finding, ComEd has complied with the provisions of Section 16-128 (c) of the Act;
- (9) the Commission has the authority to place conditions on its approval of the sale of electric generation facilities pursuant to Section 16-111 of the Act;

- (10) in order to achieve compliance by ComEd with the requirements of Sections 16-111(g) and 16-128(c) of the Act, the Commission will condition its approval of the Mission Agreement and related agreements by requiring ComEd to show that the Mission Agreement contains a provision by which employment offers will be made by the purchaser to all non-supervisory employees presently employed at the Stations.
- (11) as conditioned in the manner described in the preceding Finding, the Commission approves the execution and performance by ComEd of its obligations under the Agreements, including the PPAs and other component agreements specified therein, in substantially the form attached to ComEd's Notice, and approves the execution of such other documents and performance of such other acts as may be necessary or advisable to complete the consummation of the transactions contemplated by the Agreements;
- (12) it is in the public interest to require, pursuant to Sections 4-101 and 5-109 of the Act, that ComEd submit a report to the Commission, upon an annual basis, regarding its load and customer retention. Such report shall summarize its load by customer class, and shall indicate generally the percentage of ComEd's load attributable to customers taking service from ComEd pursuant to contract, and to tariff. ComEd shall indicate the approximate percentage of its load attributable to residential or small business customers taking traditional bundled service
- (13) ComEd shall comply with the instructions for Account 102 of the USOA by filing with the Commission the final accounting entries for the transaction, showing the actual dollar values of the assets and liabilities transferred between Commonwealth Edison, Unicom Investment, Inc., and Edison Mission Energy at the time of the transfer, with 60 days after the date of the transaction, and should provide a copy of the filing to the Director of Accounting;
- (14) confidential and proprietary treatment, including but not limited to, protection from public disclosure pursuant to Freedom of Information and other requests, for those portions of the Notice and Agreements identified in ComEd's Notice and submitted to the Clerk of the Commission under seal, is granted;
- (15) any objections, petitions, or motions which remain undisposed of should be disposed of in a manner consistent with the conclusions contained in this Order.

IT IS THEREFORE ORDERED that, upon fulfillment of the condition set forth in Finding (10), above, the consent and approval of the Illinois Commerce Commission is given for the transaction substantially in the form as set forth in the UII Agreement and the Mission Agreement, and for the execution of all of the agreements attendant thereto.

IT IS FURTHER ORDERED that Commonwealth Edison Company shall file with the Commission the final accounting entries for the transaction, showing the actual dollar values of the assets and liabilities transferred between Commonwealth Edison, Unicom Investment, Inc., and Edison Mission Energy at the time of the transfer, with 60 days after the date of the transaction, and should provide a copy of the filing to the Director of Accounting.

IT IS FURTHER ORDERED THAT Commonwealth Edison Company shall submit the annual filing described in Finding (12), above.

IT IS FURTHER ORDERED that the Clerk of the Commission is directed to maintain the confidential and proprietary designation of the documents as set forth in Finding 14 herein.

IT IS FURTHER ORDERED that any objections, petitions, or motions which remain undisposed of shall be disposed of in a manner consistent with the conclusions contained in this Order.

IT IS FURTHER ORDERED THAT subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:

BRIEFS ON EXCEPTIONS DUE:

REPLIES ON EXCEPTIONS DUE:

July 13, 1999

July 19, 1999 (12 Noon)

July 22, 1999 (12 Noon)

David Gilbert,
John Riley,
Hearing Examiners